No. 15-109

In the Supreme Court of the United States

JERMAINE SIMMONS, ET AL., PETITIONERS

v.

WALTER J. HIMMELREICH

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JOINT APPENDIX

DONALD B. VERRILLI, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

Counsel of Record
for Petitioners

CHRISTIAN G. VERGONIS
Jones Day
51 Louisiana Avenue, N.W.
Washington, D.C. 20530-0001
cvergonis@jonesday.com
(202) 879-3939

Counsel of Record
for Respondent

PETITION FOR A WRIT OF CERTIORARI FILED: JULY 23, 2015
CERTIORARI GRANTED: NOV. 6, 2015

TABLE OF CONTENTS

Page

Court of appeals docket entries (*Bivens* action) 1
District court docket entries (*Bivens* action) 7
Complaint (*Bivens* action) (Oct. 21, 2010) 41
Supplement to complaint (*Bivens* action) (Oct. 25, 2010) 64
District court order (*Bivens* action) (July 13, 2012) 65
District court docket entries (FTCA action) 67
Complaint, with attachments (FTCA action) (Feb. 11, 2010) 91
Motion to dismiss and memorandum in support of motion to dismiss (FTCA action) (Oct. 13, 2010) 102
Plaintiff's answer to defendant's motion to dismiss (FTCA action) (Nov. 8, 2010) 122
Motion to alter or amend judgment (FTCA action) (Nov. 28, 2010) 133
Notice of appeal (FTCA action) (Dec. 8, 2010) 140
Motion to recall judgment (FTCA action) (July 23, 2012) 142

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Docket No. 13-4212

WALTER J. HIMMELREICH, PLAINTIFF-APPELLANT

v.

FEDERAL BUREAU OF PRISONS, ET AL., DEFENDANTS

AND

J. FITZGERALD; LIEUTENANT BUTTS; CORRECTIONAL OFFICER SIMMONS; MS. BUNTS; MS. NEWLAND, DEFENDANTS-APPELLEES

DOCKET ENTRIES

DATE	DOCKET NUMBER	PROCEEDINGS
10/21/13	1	Prisoner Case Docketed. Notice filed by Appellant Walter J. Himmelreich. Transcript needed: n. (RB)
10/21/13	2	The case manager for this case is: Robin Duncan (RB)
11/1/13	6	CORRESPONDENCE: Letter regarding IFP forms to be filed in District Court by Walter J. Himmelreich. (RB)
11/4/13	7	APPEARANCE filed for Federal Bureau of Prisons and Appellees Bunts, Butts, J. Fitzgerald, Ms. Newland and Simmons by Lisa Hammond Johnson. Certificate of Service: 11/04/2013). (LHJ)

DATE	DOCKET NUMBER	PROCEEDINGS
12/13/13	11	Copy of District Court Order filed granting in forma pauperis (1915)(b)). (RB)
12/16/13	12	Update fee status change to 1915b. (RB)
12/16/13	14	BRIEFING LETTER SENT setting pro se briefing schedule: appellant brief due 01/28/2014;. appellee brief due 03/03/2014;. (RB)
12/26/13	15	Appellant MOTION filed by Walter J. Himmelreich to extend time to file brief. Certificate of service: Not provided. (RB)
1/6/14	16	RULING LETTER SENT granting motion to extend time to file brief [15] filed by Walter J. Himmelreich., resetting pro se briefing schedule: appellant brief now due 02/27/2014 FINAL EXTENSION. appellee brief now due 03/31/2014. (RB)
3/3/14	17	APPELLANT BRIEF filed by Walter J. Himmelreich Copies: 1. Certificate of Service: 02/27/2014. Argument Request: not received. (RB)
3/26/14	18	MOTION filed by Ms. Lisa Hammond Johnson for Butts, Simmons, J. Fitzgerald, Bunts and Ms. Newland to extend time to file brief.

DATE	DOCKET NUMBER	PROCEEDINGS
		Certificate of Service: 03/26/2014. (LHJ)
3/27/14	19	RULING LETTER SENT granting motion to extend time to file brief [18] filed by Ms. Lisa Hammond Johnson., resetting pro se briefing schedule: appellee brief now due 04/14/2014 FINAL EXTENSION (RB)
4/14/14	20	APPELLEE BRIEF filed by Ms. Lisa Hammond Johnson for Butts, Simmons, J. Fitzgerald, Bunts and Ms. Newland. Certificate of Service: 04/14/2014. Argument Request: waived. (LHJ)
4/28/14	21	Appellant MOTION filed by Walter J. Himmelreich to extend time to file reply brief. Certificate of service: 04/28/2014. (RB)
5/6/14	22	RULING LETTER SENT granting motion to extend time to file reply brief [21] filed by Walter J. Himmelreich. The reply brief is now due May 20, 2014. FINAL EXTENSION. (RB)
6/16/14	23	Appellant MOTION filed by Walter J. Himmelreich to extend time to file reply brief. Certificate of service: 06/12/2014. (RB)
7/10/14	24	Appellant LETTER filed regarding status of retrieving legal materials. Letter from Walter J.

DATE	DOCKET NUMBER	PROCEEDINGS
		Himmelreich. Dated: 06/26/2014. (RB)
7/14/14	25	Appellant LETTER filed regarding transfer of his legal materials. Letter from Walter J. Himmelreich. Dated: 07/09/2014. (RB)
8/7/14	26	Appellant LETTER filed regarding copies of the top of the box and FCI-Danbury receipt for the box of legal material received. Letter from Walter J. Himmelreich. Certificate of Service: 07/31/2014. (RB)
8/25/14	27	CORRESPONDENCE: Letter regarding boxes of legal material shipped to pro se's release residence by Walter J. Himmelreich. (RB)
9/9/14	28	PER CURIAM OPINION and JUDGMENT filed : The district court's grant of summary judgment is VACATED, and the case is REMANDED for further proceedings consistent with the opinion of this court. Decision for publication. R. Guy Cole, Jr., Chief Judge; Karen Nelson Moore and Julia Smith Gibbons, Circuit Judges. (CL)
9/26/14	29	Appellant MOTION filed by Walter J. Himmelreich under Federal Rule of Appellate Procedure 39 for

DATE	DOCKET NUMBER	PROCEEDINGS
		Costs and Value. Certificate of service: 09/20/2014. (RB)
10/23/14	30	APPEARANCE filed for Appellees Bunts, Butts, J. Fitzgerald, Ms. Newland and Simmons by Imran R. Zaidi. Certificate of Service: 10/23/2014. (IRZ)
10/24/14	31	PETITION for en banc rehearing filed by Mr. Imran Raza Zaidi for Butts, Simmons, J. Fitzgerald, Bunts and Ms. Newland. Certificate of Service: 10/24/2014. (IRZ)
11/17/14	32	MEMORANDUM IN SUPPORT filed regarding motion recover costs previously filed by Walter J. Himmelreich in 13-4212. Certificate of service: 11/10/2014. (RB)
1/5/15	33	Appellant LETTER filed regarding en banc petition. Letter from Walter J. Himmelreich. Certificate of Service: none; dated 12/20/2014. (BLH)
1/7/15	34	LETTER SENT to Walter J. Himmelreich in response to his letter dated 12/20/2014. (BLH)
3/10/15	35	ORDER filed denying petition for en banc rehearing [31] filed by Mr. Imran Raza Zaidi. Further, Himmelreich moves for an award of costs pursuant to Fed. R. App. P. 39 in this appeal. The court

DATE	DOCKET NUMBER	PROCEEDINGS
		vacated the summary judgment for defendants and remanded for further proceedings. Where a judgment is vacated, the award of costs is discretionary. Fed. R. App. P. 39(a)(4). Because Himmelreich has not yet prevailed on his claims, we deny the motion. In the event he is successful below, he may seek recovery of the appellate filing fee in district court under Fed. R. App. P. 39(e)(4), [29]. R. Guy Cole, Jr., Chief Circuit Judge; Karen Nelson Moore and Julia Smith Gibbons, Circuit Judges. (BLH)
3/18/15	36	MANDATE ISSUED with no costs taxed. (RB)
7/24/15	37	U.S. Supreme Court notice filed regarding a petition for a writ of certiorari filed by Appellee Simmons. Supreme Court Case No: 15-109, 07/23/2015. (CL)

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
(YOUNGSTOWN)

Docket No. 4:10-cv-02404-BYP

WALTER J. HIMMELREICH, PLAINTIFF

v.

FEDERAL BUREAU OF PRISONS, ET AL., DEFENDANTS

DOCKET ENTRIES

DATE	DOCKET NUMBER	PROCEEDINGS
10/21/10		Judge John R. Adams assigned to case. (C,BA) (Entered: 10/22/2010)
10/21/10	1	**Complaint** against Ms. Bunts, Lieutenant Butts, Federal Bureau of Prisons, J. Fitzgerald, Five Unknown FCI-Elkton Medical Staff Members, Nurse Folkwein, Eric Holder, Doctor Lefever, Peter B. Macari, Ms. Newland, Roger Oberkramer, J.T. Shartle, Correctional Officer Simmons, Ten Unknown Agents of the Federal Bureau of Investigation, Ten Unknown Staff Members of the United States Department of Justice Freedom of Information Act Appeals Office in Washington, D.C., Twenty Unknown Executive Staff of the Fed-

DATE	DOCKET NUMBER	PROCEEDINGS
		eral Bureau of Prisons Northeast Regional Office and the Central Office, Twenty-five Unidentified FCI-Elkton Correctional Officers, Unknown FCI-Elkton Correctional Staff Members of the Bravo Unit Disciplinary Committee, Unknown FCI-Elkton Psychology Staff Screening Officer. Filing fee not paid, IFP. Copy to plaintiff. Plaintiff has indicated that case may be related to pending civil action 1:10cv307. Filed by Walter J Himmelreich. (Attachments: #1 Civil Cover Sheet) (C,BA) (Entered: 10/22/2010)
10/21/10		Random Assignment of Magistrate Judge pursuant to Local Rule 3.1. In the event of a referral, case will be assigned to Magistrate Judge Pearson. (C,BA) (Entered: (10/22/2010)
10/21/10	2	Affidavit of prisoner filed by Walter J. Himmelreich. (C,BA) (Entered: 10/22/2010)
10/25/10	3	Supplement to Complaint filed by Walter J. Himmelreich. Related document(s) 1. (B,B) Modified filing date to match time stamp on

DATE	DOCKET NUMBER	PROCEEDINGS
		10/27/2010 (S,He). (Entered: 10/26/2010)
11/08/10	4	**Order** directing the plaintiff to either pay the $350.00 filing or submit a complete financial application within 30 days of this order. Judge John R. Adams on 11/8/10. (K,C) (Entered: 11/08/2010)
11/08/10		Copy of 4 Order mailed to Walter J. Himmelreich on 11/8/10. Related document(s) 4. (K,C) (Entered: 11/08/2010)
11/29/10	5	**Motion** to proceed without prepayment of fees (affidavit of prisoner) filed by Walter J. Himmelreich. (Attachments: # 1 Inmate Statement, #2 Copy of Envelope Addressed to Clerk's Office, #3 Letter)(B,B) Modified to create motion event on 11/30/2010 (S, HR). (Entered: 11/29/2010)
1/14/11		Random Assignment of Magistrate Judge pursuant to Local Rule 3.1. In the event of a referral, case will be assigned to Magistrate Judge Baughman. (C,BA) (Entered: 01/14/2011)
3/11/11	6	**Order** granting plaintiff's Motion to proceed in forma pauperis (Related Doc #5). An initial fee is due in

DATE	DOCKET NUMBER	PROCEEDINGS
		the amount of $3.63 to be deducted from the prison account by the cashier. Thereafter, the prison cashier shall deduct 20% of defendant's preceeding months income each time the amount exceeds $10.00 until the full fee has been paid. Judge John R. Adams on 3/11/11. (K,C) (Entered: 03/11/2011)
3/11/11	7	**Memorandum Opinion and Order** dismissing this matter. An appeal from this decision could not be taken in good faith. Judge John R. Adams on 3/11/11. (K,C) (Entered: 03/11/2011)
3/11/11	8	**Judgment Entry** dismissing this matter. An appeal from this decision could not be taken in good faith. Judge John R. Adams on 3/11/11. (K,C) (Entered: 03/11/2011)
3/14/11		Copy of 6 Order on Motion to proceed without prepayment of fees, 8 Judgment, 7 Memorandum Opinion and Order mailed to Walter J. Himmelreich on 3/14/11. Related document(s) 6 , 8 , 7 . (R,Sh) (Entered: 03/14/2011)

DATE	DOCKET NUMBER	PROCEEDINGS
4/11/11	9	**Motion** to alter or amend judgment under Federal Rule of Civil Procedure 59 (e) and for reconsideration of sua sponte dismissal of his Bivens action under 28 USC 1915 (e) filed by Plaintiff Walter J Himmelreich. (B,B) (Entered: 04/11/2011)
4/20/11	10	**Order** denying Plaintiff's Motion to alter/amend judgment (Related Doc #9) and denying Motion for reconsideration. Related Doc #9 Judge John R. Adams on 4/20/11. (K,C) (Entered: 04/20/2011)
4/20/11		Copy of 10 Order on Motion to alter/amend judgment and Order on Motion for reconsideration mailed to Walter J. Himmelreich at FCI Elkton on 4/20/11. Related document(s) 10. (K,C) (Entered: 04/20/2011)
4/29/11	11	**NOTICE OF APPEAL** to the 6th Circuit Court of Appeals from the 7 Memorandum of Opinion and Order and 8 Judgment of 3/11/11 and the 10 Order of 4/20/11, filed by Walter J Himmelreich. Filing fee not paid. (H,SP) (Entered: 05/04/2011)

DATE	DOCKET NUMBER	PROCEEDINGS
5/2/11		Partial filing fee in the amount of $3.63 received from Walter Himmelreich. Receipt #14660044519 (C,BA) (Entered: 05/02/2011)
5/6/11	12	Acknowledgment from the USCA for Sixth Circuit of receipt of 11 Notice of Appeal (USCA# 11-3474). Date filed in USCA 5/5/11. (H,SP) (Entered: 05/06/2011)
5/12/11	13	**Order** requiring the Plaintiff to either pay the $455 filing fee or seek pauper status by submitting the attached financial application with a certified copy of the prisoner's trust account statement for the six month period immediately preceding the filing of notice of appeal within thirty (30) days. Related document 11. Judge John R. Adams on 5/12/11. (Attachments: # 1 Financial Application for Appeal)(R,Sh) (Entered: 05/12/2011)
5/12/11		Copy of 13 Order, mailed to Walter Himmelreich, #13152−067 at FCI Elkton, Unit B-A, P.O.Box 10, Lisbon, OH 44432 on 5/12/11. Related document(s) 13 . (R,Sh) (Entered: 05/12/2011)
6/13/11		Partial filing fee in the amount of $2.86 received from Walter Him-

DATE	DOCKET NUMBER	PROCEEDINGS
		melreich. Receipt #14660045490 (C,BA) (Entered: 06/13/2011)
6/22/11	14	**Order** that Plaintiff failed to furnish a certified trust account statement or Acknowledgment of Understanding so the filing fee of $455.00 is assessed against Plaintiff. The prison cashier shall deduct 20% of the proceeding months income credited to the prisoner's account each time the amount exceeds $10.00 until the full fee has been paid. An appeal from this decision could not be taken in good faith. Judge John R. Adams on 6/22/11. (K,C) (Entered: 06/22/2011)
6/22/11		Copy of 14 Order, mailed to Walter J. Himmelreich and Prison Cashier at FCI Elkton on 6/22/11. Related document(s) 14 . (K,C) (Entered: 06/22/2011)
6/28/11	15	**Motion** to alter or amend order of 6/22/2011 under Federal Rule of Civil Procedure 59 filed by Plaintiff Walter J Himmelreich. (B,B) (Entered: 06/28/2011)
7/11/11		Partial filing fee in the amount of $5.90 received from Walter Himmelreich. Receipt #14660046100 (C,BA) (Entered: 07/11/2011)

DATE	DOCKET NUMBER	PROCEEDINGS
7/14/11	16	**Marginal Entry Order** denying Defendant's motion to alter/amend judgment (Related Doc #15). Judge John R. Adams on 7/14/11.(K,C) (Entered: 07/14/2011)
7/14/11		Copy of 16 Order on Motion to alter/amend judgment mailed to Walter Himmelreich at F.C.I. Elkton on 7/14/11. Related document(s) 16. (K,C) (Entered: 07/14/2011)
8/9/11		Partial filing fee in the amount of $4.02 received from Walter Himmelreich. Receipt #14660046679. (C,B) (Entered: 08/09/2011)
10/24/11		Partial Filing fee in the amount of $7.92 received from Walter Himmelreich. Receipt #14660048292. (C,B) (Entered: 11/08/2011)
1/10/12		Partial filing fee in the amount of $6.29 received from Walter Himmelreich. Receipt #14660049885 (C,BA) (Entered: 01/10/2012)
2/9/12		Partial filing fee in the amount of $5.52 received from Walter Himmelreich. Receipt #14660050577 (C,BA) (Entered: 02/09/2012)
4/10/12		Partial filing fee in the amount of $3.96 received from Walter Him-

DATE	DOCKET NUMBER	PROCEEDINGS
		melreich. Receipt #14660051928 (C,BA) (Entered: 04/10/2012)
5/8/12	17	Information copy of order from the USCA for the Sixth Circuit: Vacating the District Courts judgment on Himmelreichs First Amendment retaliation claim and Eighth Amendment failure-to-protect claim, and remand this claim for further proceedings not inconsistent with this order. Affirming the judgment in all other respects re 11 Notice of Appeal (USCA# 11-3474). This is not a mandate order. Circuit Judges: Moore, Cook and White. Date issued by USCA 5/7/12 (H,SP) (Entered: 05/08/2012)
5/16/12	18	**Motion** for an order of service by US Marshals filed by Plaintiff Walter J Himmelreich. (C,KA) Modified file date on 5/17/2012 (C,KA). (Entered: 05/17/2012)
5/17/12		Copy of 18 Motion for order of service by US Marshals mailed to plaintiff. (C,KA) (Entered: 05/17/2012)
6/11/12		Partial filing fee in the amount of $3.57 received from Walter Him-

DATE	DOCKET NUMBER	PROCEEDINGS
		melreich. Receipt #14660053361 (C,BA) (Entered: 06/11/2012)
7/2/12	19	True copy of mandate from the USCA for the Sixth Circuit: Vacating the District Court's judgment and remanding for further proceedings re 11 Notice of Appeal (USCA# 11-3474). Date issued as mandate 6/29/12, Costs: None (Related document 17) (H,SP) (Entered: 07/02/2012)
7/9/12		Partial Filing fee in the amount of $7.39 received from Walter Himmelreich. Receipt #14660053938. (C,B) (Entered: 07/24/2012)
7/13/12	20	**Order** denying Plaintiff's Motion for service (Related Doc # 18). The Clerk shall provide Plaintiff with proper forms for service upon the remaining 5 Defendants. Judge John R. Adams on 7/13/12.(K,C) (Entered: 07/13/2012)
7/13/12		Copy of 20 Order on Motion for order, copies on the complaint and 7 blank U.S. Marshal forms mailed to Walter Himmelreich at FCI Elkton on 7/13/12. Related document(s) 20. (K,C) (Entered: 07/13/2012)
7/20/12		Received 4 copies of Court Order document 20, and 4 copies of the

DATE	DOCKET NUMBER	PROCEEDINGS
		Complaint 1 from Walter J. Himmelreich. No copies of U.S. Marshal Forms were included. (B,R) (Entered: 07/20/2012)
8/7/12		Partial Filing fee in the amount of $4.78 received from Walter Himmelreich. Receipt #14660054597. (C,B) (Entered: 08/10/2012)
8/10/12	21	Letter to chambers regarding Service of the Complaint filed by Walter J Himmelreich. (R,Sh) (Entered: 08/13/2012)
8/28/12	22	**Order** directing the Clerk to provide summons to plaintiff. Upon return of completed summons, the Clerk shall combine those forms with the U.S. Marshal forms and service will begin. Judge John R. Adams on 8/28/12. (K,C) Modified text on 8/29/2012 (K,C). (Entered: 08/28/2012)
8/28/12		Copy of 22 Order mailed to Walter Himmelreich at FCI Elkton on 8/28/12. Related document(s) 22 . (K,C) (Entered: 08/28/2012)
8/28/12		Copy of 22 Order and ten (10) blank summons mailed to Walter J. Himmelreich at FCI Elkton on

DATE	DOCKET NUMBER	PROCEEDINGS
		8/28/2012. (M,TL) (Entered: 08/28/2012)
9/12/12	23	Appeal Remark from US Supreme Court: The petition for a writ of certiorari was filed on 8/2/12 and placed on the docket 9/6/12 as No. 12-6113 (H,SP) (Entered: 09/12/2012)
9/13/12		Partial filing fee in the amount of $4.78 received from Walter Himmelreich. Receipt #14660055385. (C,B) (Entered: 09/18/2012)
10/1/12	24	Original Summons and Complaint and U.S. Marshal forms issued to U.S. Marshal for service upon Ms. Bunts, Lieutenant Butts, J. Fitzgerald, Ms. Newland, Correctional Officer Simmons. (Attachments: # 1 U.S. Marshal Forms) (R,Sh) (Entered: 10/01/2012)
10/10/12		Partial filing fee in the amount of $7.39 received from Walter Himmelreich. Receipt #14660055943 (C,BA) (Entered: 10/10/2012)
10/10/12	25	Return of Service by U.S. Marshal by certified mail executed upon Ms. Bunts; Lieutenant Butts; Ms. Newland and Correctional Officer Simmons on 10/5/2012, filed on behalf of

DATE	DOCKET NUMBER	PROCEEDINGS
		Walter J Himmelreich (R,Sh) (Entered: 10/10/2012)
10/30/12	26	Appeal Order from US Supreme Court: The petition for a writ of certiorari is denied re 23 (No. 12-6113) (H,SP) (Entered: 10/30/2012)
11/1/12	27	**Motion** for temporary restraining order and preliminary injunction against the Federal Bureau of Prisons, Inmate Telephone Service (ITS), for violations of the Fourteenth Amendment Right to due process, the Fourteenth Amendment right to equal protection under the laws, and the First Amendment rights to freedom of speech and redress, and interfering with interstate commerce filed by Plaintiff Walter J Himmelreich. (Attachments: #1 TRULINCS Account Transaction Log-TRUFONE, #2 Notification Regarding Limitations on Inmate Telephone Calls)(B,B) (Entered: 11/01/2012)
11/14/12	28	Memorandum in **Opposition** to 27 **Motion** for temporary restraining order and **Motion** for preliminary injunction filed by Federal Bureau

DATE	DOCKET NUMBER	PROCEEDINGS
		of Prisons. (Johnson, Lisa) Modified text on 11/16/2012 (S,He). (Entered: 11/14/2012)
11/15/12	29	Supplement to 27 **Motion** for temporary restraining order **Motion** for preliminary injunction filed by Walter J Himmelreich. Related document(s) 27 . (Attachments: #1 Federal Bureau of Prisons Trulincs Account Transactions—Trufone—Personal Inmate Information)(E,P) (Entered: 11/15/2012)
11/16/12	30	Attorney Appearance *Co–Counsel* by Heather Tonsing Volosin filed by on behalf of Federal Bureau of Prisons. (Volosin, Heather) (Entered: 11/16/2012)
11/26/12	31	**Motion** to request clarification as to correct named defendant in case filed by Plaintiff Walter J Himmelreich. Related document(s) 28 . (E,P) (Entered: 11/26/2012)
11/26/12	32	**Response** to 28 Memorandum in **Opposition** to 27 **Motion** for temporary restraining order filed by Walter J Himmelreich. (B,B) Modified text and created link on 11/28/2012 (S,He). (Entered: 11/26/2012)

DATE	DOCKET NUMBER	PROCEEDINGS
12/10/12	33	Writ of praecipe regarding temporary restraining order and **Motion** requesting a hearing on the motion for temporary restraining order be held by 12/21/2012 filed by Plaintiff Walter J Himmelreich. (Attachments: #1 Federal Bureau of Prisons TRULINCS Account Transactions—TRUFONE Personal Inmate Information)(B,B) (Entered: 12/10/2012)
12/11/12		Partial Filing fee in the amount of $12.78 received from Walter Himmelreich. Receipt #14660057258. (C,B) (Entered: 12/11/2012)
1/15/13		Partial filing fee in the amount of $16.18 received from Walter Himmelreich. Receipt #14660058033 (C,BA) (Entered: 01/15/2013)
1/16/13	34	Letter to Chambers with attached letter to the Clerk regarding docket sheet and service filed by Walter J. Himmelreich. (R,Sh) Modified filed date to match timestamp on document on 1/23/2013 (S,He). (Entered: 01/17/2013)
1/29/13	35	Return of Service by U.S. Marshal by certified mail executed upon Captain J. Fitzgerald on 1/24/2013,

DATE	DOCKET NUMBER	PROCEEDINGS
		filed on behalf of Walter J Himmelreich (R,Sh) (Entered: 01/29/2013)
2/7/13	36	**Case Management Conference Scheduling Order** with case management conference to be held on 3/14/2013 at 02:30 PM telephonically. Counsel for Defendants shall provide the Court with a contact number for Defendant representative as well as themselves. Judge John R. Adams on 2/5/13. (Attachments: #1 Report of Parties, #2 Rule 30.1, #3 Consent to Magistrate Judge, #4 Budget, #5 Policy and Procedure Manual)(K,C) (Entered: 02/07/2013)
2/7/13	37	**Order** denying Plaintiff's Motion for Temporary Restraining Order and for preliminary injunction (Related Doc #27); Denying Plaintiff's Motion to clarify (Related Doc #31); Denying Plaintiff's Motion for conference (Related Doc #33). Further, the Warden of F.C.I. Elkton is directed to make inmate Walter J. Himmelreich available by phone on 3/14/13 at 2:30 p.m. for the Case Management Conference. The Warden designee shall contact the court to provide a contact phone

DATE	DOCKET NUMBER	PROCEEDINGS
		number. Judge John R. Adams on 2/5/13.(K,C) (Entered: 02/07/2013)
2/7/13		Copy of 36 Case Management Conference Scheduling Order and 37 Order on Motion for Temporary Restraining Order, Order on Motion for preliminary injunction, Order on Motion to clarify, Order on Motion for conference mailed to both Walter Himmelreich and Warden at FCI Elkton on 2/7/13. Related document(s) 36 , 37 . (K,C) (Entered: 02/07/2013)
2/8/13		Partial Filing Fee in the amount of $8.02 received from Walter J. Himmelreich. Receipt # 14660058596 (S,R) (Entered: 02/08/2013)
3/8/13	38	**Motion** to continue Case Management Conference filed by Ms. Bunts, Lieutenant Butts, , J. Fitzgerald, Ms. Newland, Correctional Officer Simmons. Related document(s) 36 . (Johnson, Lisa) Modified filers on 3/11/2013 (M,TL). (Entered: 03/08/2013)
3/8/13	39	**Order** granting Defendant's Motion to continue the case management conference (Related Doc #38). Conference is continued to 4/1/2013 at 02:00 PM at Courtroom 575

DATE	DOCKET NUMBER	PROCEEDINGS
		before Judge John R. Adams. Judge John R. Adams on 3/8/13.(K,C) (Entered: 03/08/2013)
3/12/13		Partial filing fee in the amount of $19.92 received from Walter Himmelreich. Receipt #14660059340 (C,BA) (Entered: 03/12/2013)
3/14/13	40	**Response** to 38 **Motion** to continue Case Management Conference filed by Walter J Himmelreich. (K,K) (Entered: 03/14/2013)
3/19/13	41	Returned Mail addressed to Warden FCI Elkton marked not deliverable as addressed, unable to forward. Related document(s) 39. (R,Sh) (Entered: 03/19/2013)
3/20/13		Copy of 39 Order on Motion to continue and 41 Returned Mail receipt mailed to Walter Himmelreich at FCI Elkton on 3/20/13. Unknown as to why FCI Elkton returned his mail, Plaintiff is currently at Elkton. Related document(s) 39, 41. (K,C) (Entered: 03/20/2013)
3/20/13	42	Letter regarding court orders and program statements filed by Walter J Himmelreich. (R,Sh) (Entered: 03/20/2013)

DATE	DOCKET NUMBER	PROCEEDINGS
3/21/13		Copy of 39 Order mailed to Warden, FCI Elkton at Federal Correctional Institution, P.O. Box 10, Lisbon, OH 44432 on 3/21/2013. (S,He) (Entered: 03/21/2013)
4/1/13		**Minutes of proceedings** [non-document] before Judge John R. Adams. Case Management Conference held on 04/01/2013. (Court Reporter: none) Time: 20 minutes. (M,TL) Modified text on 4/4/2013 (S,He). (Entered: 04/01/2013)
4/9/13		Partial filing fee in the amount of $21.12 received from Walter Himmelreich. Receipt #14660059987 (C,BA) (Entered: 04/09/2013)
4/10/13	43	**Order.** This matter is assigned to the STANDARD track. Defendants have indicated that they intend to file an immediate dispositive motion. The motion shall be filed no later than April 26, 2013. Plaintiff shall respond by no later than May 31, 2013. Defendants shall reply no later than June 14, 2013. If the matter proceeds beyond this initial motion practice, the Court will schedule additional dates as necessary. Judge John R. Adams on

DATE	DOCKET NUMBER	PROCEEDINGS
		4/10/2013. (R,Sh) (Entered: 04/10/2013)
4/10/13		Copy of 43 Order, mailed to Walter J. Himmelreich on 4/10/2013. Related document(s) 43. (R,Sh) (Entered: 04/10/2013)
4/11/13	44	**Motion** to compel United States Marshals Service for the Northern District of Ohio, through the Office of the Clerk of the Court, to serve the complaint in the above captioned action upon the United States Attorney General and the United States Attorney's Office for the Northern District of Ohio, pursuant to 28 USC § 1361 filed by Plaintiff Walter J Himmelreich. (Attachments: #1 Exhibit–Byrd vs. Stone, #2 Exhibit—Affidavit, #3 Exhibit—USMS forms, #4 Exhibit—Letter dated 8/5/2012, #5 Exhibit—Letter dated 8/30/2013 and summons, #6 Exhibit—Letter dated 10/19/2013, #7 Exhibit—Letter dated 10/28/2013, #8 Exhibit —Letter dated 1/6/2013, #9 Exhibit —Letter dated 2/12/2013, #10 Exhibit—Affidavit and summons) (K,K) (Entered: 04/11/2013)

DATE	DOCKET NUMBER	PROCEEDINGS
4/26/13	45	**Motion** for summary judgment filed by Ms. Bunts, Lieutenant Butts, J. Fitzgerald, Ms. Newland, Correctional Officer Simmons. (Attachments: #1 Brief in Support, #2 Affidavit—Declaration of Marisa Davidson, #3 Exhibit Attachment to Declaration—Document A, #4 Exhibit Attachment to Declaration—Document B) (Johnson, Lisa) (Entered: 04/26/2013)
4/29/13	46	Amended Certificate of Service filed by Ms. Bunts, Lieutenant Butts, J. Fitzgerald, Ms. Newland, Correctional Officer Simmons. Related document 45. (Johnson, Lisa) Modified text on 4/30/2013 (M,TL). (Entered: 04/29/2013)
5/7/13		Partial filing fee in the amount of $13.92 received from Walter Himmelreich. Receipt #14660060639 (C,BA) (Entered: 05/07/2013)
6/3/13	47	**Response** to **Motion** for summary judgment filed by Walter J Himmelreich. (Attachments: #1 Administrative Remedy, #2 Letter, # 3 Note to Fritz, #4 Note to Fritz, # 5 Note to Fritz, #6 Request for Administrative Remedy Informal

DATE	DOCKET NUMBER	PROCEEDINGS
		Resolution Form, FCI, Elkton, Ohio, #7 Request for Administrative Remedy Informal Resolution Form, FCI, Elkton, Ohio, #8 Note to Mr. Perine, #9 Request for Administrative Remedy, #10 Request for Administrative Remedy, #11 Program Statement, #12 Inmate Request to Staff, #13 Inmate Request to Staff, #14 Request for Administrative Remedy Informal Resolution Form FCI Elkton, Ohio) (Related doc 45)(B,B) (Entered: 06/04/2013)
6/11/13		Partial Filing fee in the amount of $18.49 received from Walter Himmelreich. Receipt #14660061394. (C,B) (Entered: 06/11/2013)
6/14/13	48	Supplement to 47 Plaintiff's Response filed by Walter J Himmelreich. Related document(s) 47 . (Attachments: #1 Exhibit—Attachments)(K,K) (Entered: 06/17/2013)
6/18/13	49	Newly received supplemental information and request to reinstitute Warden Shartle as a co-defendant in his personal capacity filed by Walter J Himmelreich. (Attachments: #1 Inmate Request to

DATE	DOCKET NUMBER	PROCEEDINGS
		Staff, #2 Administrative Remedy Generalized Retrieval Print-Out)Related document(s) 45 , 47 .(B,B) (Entered: 06/18/2013)
6/18/13	50	Reply to Plaintiff's 47 Response to Defendant's 45 Motion for Summary Judgment filed by all Defendants. (Attachments: #1 Affidavit Declaration of Marisa Davidson, #2 Exhibit Doc. A, Administrative Remedy Retrieval, Part 1, attachment to Declaration of Marisa Davidson, #3 Exhibit Doc. A, Administrative Remedy Retrieval, Part 2, attachment to Declaration of Marisa Davidson, #4 Exhibit Doc. B, Administrative Remedy, Attachment to Declaration of Marisa Davidson, #5 Exhibit Doc. C, Tort Claim Details, Attachment to Declaration of Marisa Davidson) (Johnson, Lisa) Modified text and added link on 6/19/2013 (M,TL). (Entered: 06/18/2013)
7/2/13	51	Traverse of Defendant's Second Declaration of Marisa Davidson filed by Walter J Himmelreich. (B,B) (Entered: 07/02/2013)
7/10/13		Partial Filing fee in the amount of $19.39 received from Walter Him-

DATE	DOCKET NUMBER	PROCEEDINGS
		melreich. Receipt #14660062130. (C,B) (Entered: 07/17/2013)
7/17/13	52	Notice of Termination of Counsel filed by All Defendants. (Volosin, Heather) (Entered: 07/17/2013)
7/18/13	53	**Order and Decision** granting Defendants' Motion for summary judgment (Related Doc #45). The complaint is dismissed. An appeal from this decision could not be taken in good faith. Judge John R. Adams on 7/18/13.(K,C) (Entered: 07/18/2013)
7/18/13	54	**Judgment Entry** granting Defendants' motion for summary judgment. The complaint is dismissed; An appeal from this decision could not be taken in good faith. Judge John R. Adams on 7/18/13. (K,C) (Entered: 07/18/2013)
7/18/13		Copy of 54 Judgment and 53 Order on Motion for summary judgment mailed to Walter Himmelreich at FCI Elkton on 7/19/13. Related document(s) 54 , 53 . (K,C) Modified mailed date on 7/19/2013 (K,C). (Entered: 07/18/2013)
8/12/13		Partial filing fee in the amount of $14.18 received from Walter Him-

DATE	DOCKET NUMBER	PROCEEDINGS
		melreich. Receipt #14660062948 (C,BA) (Entered: 08/12/2013)
8/13/13	55	**Motion** to alter or amend judgment under Federal Rule of Civil Procedure 59 (e) filed by Plaintiff Walter J Himmelreich. (Attachments: # 1 Request for Administrative Remedy Informal Resolution Form, #2 Request for Administrative Remedy Informal Resolution Form, # 3 Request for Administrative Remedy Informal Resolution Form, #4 Request for Administrative Remedy Informal Resolution Form) (B,B) (Entered: 08/13/2013)
8/27/13	56	Memorandum in **Opposition** to 55 **Motion** to alter/amend judgment filed by Ms. Bunts, Lieutenant Butts, J. Fitzgerald, Ms. Newland, Correctional Officer Simmons. (Johnson, Lisa) Modified text on 8/28/2013 (S,He). (Entered: 08/27/2013)
10/1/13	57	**Marginal Entry Order** denying Plaintiff's Motion to alter or amend judgment (Related Doc # 55). Judge John R. Adams on 10/1/2013.(R,Sh) (Entered: 10/01/2013)

DATE	DOCKET NUMBER	PROCEEDINGS
10/1/13		Copy of 57 Order on Motion to alter/amend judgment mailed to Walter Himmelreich on 10/1/2013. Related document(s) 57. (R,Sh) (Entered: 10/01/2013)
10/11/13	58	**NOTICE OF APPEAL** to the Sixth Circuit Court of Appeals from the 53 Order and Decision and 54 Judgment Entry of 7/18/13, 57 Marginal Entry Order of 10/1/13, filed by Walter J Himmelreich. Filing fee not paid. (H,SP) (Entered: 10/15/2013)
10/11/13	59	**Motion** for in forma pauperis status, filed by Plaintiff Walter J Himmelreich (Related document(s) 58). (H,SP) (Entered: 10/15/2013)
10/11/13		Partial Filing fee in the amount of $.10 received from Walter Himmelreich. Receipt #14660064402. (C,B) (Entered: 10/17/2013)
10/16/13	60	**Order** directing plaintiff to either pay the full appeal fee of $455.00 or file the Financial Application within 30 days of this order or the appeal may be dismissed for want of prosecution. Judge John R. Adams on 10/16/13. (K,C) (Entered: 10/16/2013)

DATE	DOCKET NUMBER	PROCEEDINGS
10/16/13		Copy of 60 Order mailed to Walter J. Himmelreich at FCI Elkton on 10/16/13. Related document(s) 60 . (K,C) (Entered: 10/16/2013)
10/22/13	61	Acknowledgment from the USCA for Sixth Circuit of receipt of 58 Notice of Appeal (USCA# 13-4212). Date filed in USCA 10/21/13. (H,SP) (Entered: 10/22/2013)
11/13/13		Partial filing fee in the amount of $1.20 received from Walter Himmelreich. Receipt #14660065083 (C,BA) (Entered: 11/13/2013)
11/18/13	62	**Financial Application** for appeal filed by Plaintiff Walter J Himmelreich (Related document(s) 60, 58). (Attachments: #1 Inmate Statement) (H,SP) (Entered: 11/18/2013)
11/19/13	63	Letter regarding In Forma Pauperis Appeal, 13-4212 filed by Walter J Himmelreich. (R,Sh) (Entered: 11/19/2013)
12/9/13		Partial filing fee in the amount of $1.68 received from Walter Himmelreich. Receipt #14660065745 (C,BA) (Entered: 12/09/2013)
12/10/13	64	**Order** granting Plaintiff's Motions to appeal in forma pauperis (Relat-

DATE	DOCKET NUMBER	PROCEEDINGS
		ed Doc #59 & #62). An initial partial fee in the amount of $10.91 is due and should be deducted from plaintiff's prisoner account. The prison cashier's office shall deduct 20% of the preceding month's income credited to the prisoner's account each time the amount in the account exceeds $10.00 until the full fee has been paid. Judge John R. Adams on 12/10/13.(K,C) (Entered: 12/10/2013)
12/10/13		Copy of 64 Order on Motion to appeal in forma pauperis mailed to Walter J. Himmelreich at FCI Elkton and prison cashier on 12/10/13. Related document(s) 64. (K,C) (Entered: 12/10/2013)
1/2/14		Partial Filing Fee in the amount of $10.91 received from Walter Himmelreich. Receipt #14660066254 (S,R) (Entered: 01/02/2014)
1/14/14		Partial filing fee in the amount of $13.40 received from Walter Himmelreich. Receipt #14660066518 (C,BA) (Entered: 01/14/2014)
2/11/14		Partial filing fee in the amount of $12.60 received from Walter Himmelreich. Receipt #14660067231 (C,BA) (Entered: 02/11/2014)

DATE	DOCKET NUMBER	PROCEEDINGS
2/11/14		Partial filing fee in the amount of $2.60 received from Walter Himmelreich. Receipt #14660067238 (C,BA) (Entered: 02/11/2014)
3/14/14		Partial filing fee in the amount of $10.32 received from Walter Himmelreich. Receipt #14660068119 (C,BA) (Entered: 03/14/2014)
4/10/14		Partial filing fee in the amount of $1.18 received from Walter Himmelreich. Receipt #14660068746 (C,BA) (Entered: 04/10/2014)
4/10/14		Partial filing fee in the amount of $11.18 received from Walter Himmelreich. Receipt # 14660068759 (C,BA) (Entered: 04/10/2014)
4/28/14	65	**Motion** for temporary restraining order and **Motion** for preliminary injunction filed by Plaintiff Walter J. Himmelreich. (E,P) (Entered: 04/28/2014)
5/16/14	66	Address Change Notice filed by Walter J Himmelreich. (E,P) (Entered: 05/16/2014)
7/11/14		Partial filing fee in the amount of $4.90 received from Walter Himmelreich. Receipt #14660070803 (C,BA) (Entered: 07/11/2014)

DATE	DOCKET NUMBER	PROCEEDINGS
8/12/14		Partial filing fee in the amount of $27.76 received from Walter Himmelreich. Receipt #14660071482 (C,BA) (Entered: 08/12/2014)
8/27/14	67	**Marginal Entry Order** denying Plaintiff's Motion for temporary restraining order and preliminary injunction (Related Doc # 65). Judge John R. Adams on 8/27/14.(L,J) (Entered: 08/27/2014)
8/27/14		Copy of 67 Order on Motion for order, Order on Motion for preliminary injunction mailed to Walter J. Himmelreich at Danbury FCI, Inmate Mail/Parcels, Route 37, Danbury, CT 06811 on 8/27/14. Related document(s) 67. (L,J) (Entered: 08/27/2014)
9/29/14	69	**Motion** for Pretrial Scheduling Conference, Discovery and Depositions if Necessary filed by Plaintiff Walter J Himmelreich. (B,R) (Entered: 09/30/2014)
10/10/14		Partial Filing fee in the amount of $2.76 received from Walter Himmelreich. Receipt #14660072828. (C,B) (Entered: 10/24/2014)
11/12/14		Partial filing fee in the amount of $8.08 received from Walter Him-

DATE	DOCKET NUMBER	PROCEEDINGS
		melreich. Receipt #14660073527 (C,BA) (Entered: 11/12/2014)
12/9/14		Partial filing fee in the amount of $2.20 received from Walter Himmelreich. Receipt #14660074196 (C,BA) (Entered: 12/09/2014)
1/21/15		Partial filing fee in the amount of $4.08 received from Walter Himmelreich. Receipt #14660075075 (C,BA) (Entered: 01/21/2015)
2/23/15		Partial filing fee in the amount of $7.32 received from Walter Himmelreich. Receipt #14660075836 (C,BA) (Entered: 02/23/2015)
3/19/15	70	True copy of mandate from the USCA for the Sixth Circuit: Vacating the District Court's summary judgment and remanding for further proceedings re 58 Notice of Appeal (USCA#13-4212). Date issued as mandate 3/18/15, Costs: None (H,SP) (Entered: 03/19/2015)
3/25/15	71	**Order** of Recusal. This case is returned to the Clerk for reassignment to another judge. Judge John R. Adams on 3/25/15. (K,C) (Entered: 03/25/2015)

DATE	DOCKET NUMBER	PROCEEDINGS
3/25/15		Copy of 71 Order reassigning case mailed to Walter Himmelreich at FCI Danbury on 3/25/15. Related document(s) 71. (K,C) (Entered: 03/25/2015)
3/25/15		Judge Benita Y. Pearson assigned to case. Judge John R. Adams terminated. (M,TL) (Entered: 03/25/2015)
3/30/15	72	**Order** referring case to Magistrate Judge William H. Baughman, Jr. for general pretrial supervision. Judge Benita Y. Pearson on 3/30/2015. (JLG) (Entered: 03/30/2015)
3/30/15		Copy of 72 Order of Referral mailed to Plaintiff Walter J. Himmelreich #13152-067, Danbury FCI, Inmate Mail/Parcels, Route 37, Danbury, CT 06811 on 3/30/2015. Related document(s) 72. (JLG) (Entered: 03/30/2015)
4/13/15	73	**Motion** to vacate referral to Magistrate Judge and proceed w/document 69 motion filed by Plaintiff Walter J Himmelreich. Related document(s) 72. (C,KA) (Entered: 04/14/2015)

DATE	DOCKET NUMBER	PROCEEDINGS
4/14/15		Partial filing fee in the amount of $3.01 received from Walter Himmelreich. Receipt #14660077088 (C,BA) (Entered: 04/14/2015)
4/14/15	74	**Order** denying 73 Motion to vacate. Judge Benita Y. Pearson on 4/14/2015. (JLG) (Entered: 04/14/2015)
4/14/15		Copy of 74 Order denying Motion to Vacate mailed to Plaintiff Walter J. Himmelreich #13152-067, Danbury FCI, Inmate Mail/Parcels, Route 37, Danbury, CT 06811 on 4/14/2015. Related document(s) 74. (JLG) (Entered: 04/14/2015)
7/28/15	75	Appeal Remark from US Supreme Court: The petition for a writ of certiorari was filed on 7/23/15 and placed on the docket 7/23/15 as No. 15-109 (H,SP) (Entered: 07/28/2015)
8/11/15		Partial filing fee in the amount of $20.04 received from Walter Himmelreich. Receipt #14660079630 (C,BA) (Entered: 08/11/2015)
9/11/15	76	**Marginal Order** denying Plaintiff's 69 Motion, as requested, without prejudice to being refiled, if necessary. Judge Benita Y. Pearson on

DATE	DOCKET NUMBER	PROCEEDINGS
		9/11/2015. (JLG) (Entered: 09/11/2015)
9/11/15		Copy of 76 Marginal Order mailed to Plaintiff Walter J. Himmelreich #13152-067, Danbury FCI, Inmate Mail/Parcels, Route 37, Danbury, CT 06811 on 9/11/2015. Related document(s) 76 . (JLG) (Entered: 09/11/2015)

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. 4:10CV2404

WALTER J. HIMMELREICH, PLAINTIFF

v.

FEDERAL BUREAU OF PRISONS; FEDERAL BUREAU OF PRISIONS, T/D/B/A FEDERAL CORRECTIONAL INSTITUTION-ELKTON; FEDERAL INMATE PETER B. MACARI; FEDERAL INMATE ROGER OBERKRAMER; CAPTAIN J. FITZGERALD, FORMER SECURITY CAPTAIN OF FCI-ELKTON; LIEUTENANT BUTTS, FCI-ELKTON SIS SECURITY LT.; CORRECTIONAL OFFICER SIMMONS; MS. BUNTS, FCI-ELKTON HEALTH SERVICES ADMINISTRATOR; DOCTOR LEFEVER, FORMER FCI-ELKTON PSYCHOLOGY DEPARTMENT STAFF DR.; FIVE UNKNOWN FCI-ELKTON MEDICAL STAFF MEMBERS; NURSE FOLKWEIN, FCI-ELKTON MEDICAL STAFF; MS. NEWLAND, FCI-ELKTON UNIT BB CASE MANAGER; UNKNOWN FCI-ELKTON PSYCHOLOGY STAFF SCREENING OFFICER; UNKNOWN FCI-ELKTON CORRECTIONAL STAFF MEMBERS OF THE BRAVO UNIT DISCIPLINARY COMMITTEE; WARDEN J.T. SHARTLE, FCI-ELKTON WARDEN; TWENTY-FIVE UNIDENTIFIED FCI-ELKTON CORRECTIONAL OFFICERS; TWENTY UNKNOWN EXECUTIVE STAFF OF THE FEDERAL BUREAU OF PRISONS NORTHEAST REGIONAL OFFICE AND THE CENTRAL OFFICE; ATTORNEY GENERAL ERIC HOLDER; TEN UNKNOWN AGENTS OF THE FEDERAL BUREAU OF INVESTIGATION; TEN UNKNOWN STAFF MEMBERS OF THE UNITED STATES DEPARTMENT OF JUSTICE FREEDOM OF INFORMATION ACT APPEALS OFFICE IN WASHINGTON, D.C.

[Filed: Oct. 21, 2010]

COMPLAINT UNDER BIVENS

Complaint in Violation of the Plaintiff's Constitutional Rights Against Cruel and Unusual Punishment Under the Eighth Amendment and in Violation of the Plaintiff's Civil Rights Under Bivens

I. **Previous Lawsuits**

A. Have you begun other lawsuits in state or federal court dealing with the same facts involved in this action or otherwise relating to your imprisonment? YES ~~NO~~

B. If your answer to A is yes, describe the lawsuit in the space below. (If there is more than one lawsuit, describe the additional lawsuits on another piece of paper, using the same outline.)

1. Parties to this previous lawsuit:

Plaintiffs **Walter J. Himmelreich**

Defendants **United States ofAmerica**

Case Number 10-00307 in Northern District of Ohio

2. Court (if federal court, name the district; if state court, name the county):

   US District Court, Nothern District of Ohio, Eastern Division

3. Docket Number: **4:10-cv-00307-JRA**

4. Name of judge to whom case was assigned **Judge John R. Adams**

5. Disposition (for example: Was the case dismissed? Was it appealed? Is it still pending?):

   Currently Active on the Court's Docket

6. Approximate date of filing lawsuit: **February 11, 2010**

7. Approximate date of disposition: **Not Applicable**

II. **Place of Present Confinement: Federal Correctional Institution – Elkton**

A. Is there a prisoner grievance procedure in this institution? YES ~~NO~~

B. Did you present the facts relating to your complaint in the state prisoner grievance procedure? YES ~~NO~~

C. If your answer is "yes",

   1. What steps did you take? **Filed initial grievance regarding both security issues and one regarding medical co-pay**

2. What was the result? **Security Captain threatened me for filing and Medical Co-pay issue was not resolved.**

D. If your answer is "not", explain why not:

Not Applicable

E. If there is no prisoner grievance procedure in the institution, did you complain to prison authorities? YES NO

Not Applicable

F. If your answer is "yes",

1. What steps did you take? **Not Applicable**

2. What was the result? **Not Applicable**

III. **Parties**

(In item A below, place your name in the first blank and place your present address in the second blank. Do the same for additional plaintiffs, if any.)

A. Name of the Plaintiff **Walter J. Himmelreich**

Federal Register # 13152-067

Address **FCI-Elkton P.O. Box 10 Unit BA Lisbon, OH 44432**

(In item B below, place the full name of the defendant in the first blank, his or her official position in the second blank, and his or her place of employment in the third blank. Use item C for the names, positions and places of employment of any additional defendants.)

B. Defendant **Fedearl Bureau of Prisons** is employed as **Not Applicable** at **Not Applicable**

C. Additional Defendants

See Attached Sheets

IV. **Statement of Claim**

(State here the facts of your case. Describe how each defendant is involved. Include also the names of other persons involved, dates and places. Do not give any legal arguments or cite any cases or statutes. If you intend to allege a number of related claims, number and set forth each claim in a separated paragraph. Use as much space as you need. Attach extra sheet(s) if necessary.)

1) That on October 11, 2008, Federal Inmate Roger Oberkramer told the Plaintiff: "I'm going to find a place where there's no cameras and fuck you up!".

2) That the Plaintiff attempted to tell Federal Correctional Institution – Elkton (FCI-Elkton or Elkton) security staff officer who had told the Plaintiff that if he ever had any trouble to come and let him know about it, prior to October 20, 2008. This attempt was in vain as the Plaintiff could not find an opportunity to hold a private conversation regarding this topic.

3) That in the prison environment, a person who tells a correctional officer (C/O) of what transpired between himself and another inmate is considered to be a rat or a snitch and can lead to serious trouble for that inmate in the long run.

4) That when Federal Inmate Peter B. Macari was admitted as an inmate to Elkton, he was assigned to

Housing Unit BB, where Inmate Oberkramer was also assigned bed space.

5) That the Plaintiff did not have personal contact with Macari prior to October 20, 2008.

6) That prior to October 14, 2008, Macari was placed in the Special Housing Unit (SHU) for an infraction of the Elkton Rules and then refused his release from the SHU into the General Population portion of the compound, causing him to receive an incident report for refusing a program assignment on October 14, 2008.

7) That on October 16, 2008, Macari met with B-Unit Unit Disciplinary Team (UDC). During that particular meeting, he told them: "I have had a lot of stress here, am not able to live with pedophiles. Also, I am not able to take the right programs here, everything seems to be going against me. If I go back out on the compound, I will smash a pedophile.".

8) That the Plaintiff is reputedly, among the inmate community, one of the biggest pedophiles on the Elkton compound and is aware that other inmates have that perception of him. The biggest rumor about the Plaintiff on the Elkton compound is that he had two little boys in the trunk of his car crossing over state lines and taking them to have sex with them when he was apprehended and the boys were rescued by the cops. This is totally untrue.

9) That the Elkton staff does little to quash these types of rumors.

10) That Ms. Newland is and has been the BB Unit Case Manager.

11) That Ms. Newland, as a part of her duty assignment, would include her reviewing Macari's PreSentence Investigation Report (PSI), which would be in his "Red File", which every inmate has and which every Case Manager reviews on at least a periodic basis and more often should special circumstances arise (such as Macari's statement as to his intentions/should he be released from the SHU).

12) That as a Case Manager, Ms. Newland is supposed to be intimately involved in the general everyday events concerning the inmates in the unit in which she is a Case Manager for.

13) That a review of Macari's PSI will show that he has extreme violence in his past. He was sentenced to serve ten years in the Illinois State Prison System for First Degree Attempted Murder for beating a man over the head with a baseball bat as a Local 110 Projectionists Union enforcer while he was trying to earn his projectionist license in the Chicago area.

14) Further review of Macari's PSI will show that he was paroled from the State of Illinois to the Federal Bureau of Prisons to serve out his term of incarceration for an Arson charge.

15) That Ms. Newland failed in the performance of her duties in her failure to fully examine Macari's jacket, note the extreme violence that Macari was capable of, and then notify her superior(s), and/or the executive staff of Elkton, of the potential danger to as many as 20 percent or more of the general inmate population of Elkton; who could have stopped Macari's release from the SHU in any number of different ways.

16) That in order to be released from the SHU, there is a process that inmates must go through including having bed space available, approval of the Security Department, in this case approval of the Psychology Department, and approval of the executive staff during the weekly staff SHU meeting.

17) That Macari had been having some problems at home which also caused him stress at Elkton and which he told staff about both verbally and in writing.

18) That Macari had pleaded with the Elkton Staff, writing it out and giving it to the DHO, and UDC and even to Dr. Lefever.

19) That between October 16, 2008 and October 20, 2008, Macari was harassed by teasing and taunting from unknown SHU staff members who told Macari that he was a wimp and that he wouldn't harm anyone. (This harassment was a form of brainwashing which can't be ignored in the overall picture of what happened to the Plaintiff.)

20) That on October 20, 2010, Macari was released from the SHU and received his personal property and was sent back to BB housing unit to unpack and start melding back in to the everyday life in the Elkton inmate general population. Macari never unpacked his property that day.

21) That at approximately 15:20 on October 20, 2008, the normal institutional recall in preparation for the four PM standing count was called. The Plaintiff was working in the Elkton Facilities Department as an all day employee on that date and returned to his housing dormitory (BA) on the recall.

22) Walking back to the housing unit from Facilities that afternoon, the Plaintiff was walking back to the housing unit and chatting with Inmate Randy Winslow. The Plaintiff was also thinking about the Kent State University Course in Introduction to Business exam that he was scheduled to take that evening.

23) That Correctional Officer Simmons (Simmons) had been posted to B Unit as the Unit Security Officer on October 20, 2008, during the day watch because the regular officer was not available that day.

24) That during the Recall movement on October 20, 2008, Simmons was standing outside of the BA sally-port door, approximately 10 feet or more from the door, smoking cigarettes.

25) That the Plaintiff is unaware of who was working as the A Unit Security Officer on that day since the officer was not outside the door or standing in the sallyport during the controlled movement for recall that day.

26) That the Plaintiff was entering the sallyport and noticed Oberkramer with another inmate he did not recognize standing on the B Unit landing of the stair-well and pointing in the Plaintiff's direction with the unknown inmate nodding and gripping the handrail very tightly.

27) That as the Plaintiff climbed the stairs, he was still conversing with Inmate Winslow, was holding the railing with his right hand and had his left hand in his coat pocket. The unknown inmate was pacing back and forth on the landing at this time.

28) That as the Plaintiff was completing the staircase climb, was reaching for the handrail of the landing, and

still had his left hand in his coat pocket, and was taking the step to the landing, he saw Inmate Winslow duck and run for the B Unit door and into the Unit. At the same time, the Plaintiff saw the unknown inmate (later identified as Macari) coming towards the Plaintiff with his left hand in a fist, his left arm at a 90 degree angle and reared back, a mean scowl on his face, and then the largest fist the Plaintiff had ever seen coming directly towards his face.

29) That the Plaintiff moved his head to the side slightly and the large fist caught him in the left side of the Plaintiff's face. The Plaintiff's glasses flew against the far wall of the landing and when the Plaintiff recovered them, they were twisted and mangled from the blow on the left side of the face.

30) The Plaintiff then caught a second blow in the left rib cage from Macari's right fist which knocked some of the wind out of the Plaintiff. The Plaintiff then saw that he was up against a three and a half to four foot high railing, off balance, and that Macari had his back to the wall and could shove Plaintiff over the railing in short order, so the Plaintiff ducked below the railing level and headed towards the far wall and his glasses followed by Macari who was throwing more punches.

31) The Plaintiff then ended up lying on the floor is almost a fetal position, trying to protect his head with his arms and with his back facing Macari, continuously being pummelled and kicked in the head, back, and ribs.

32) That the inmates who were returning to B Unit during the Recall were yelling about the **FIGHT** in the stairwell and in the Unit, lound enough that it should

have attracted some attention, but neither Simmons nor the unknown A Unit correctional officer appeared to break up the fight or call other staff to do so.

33) That during all of this, Oberkramer was inside the B Unit door after the stairwell had cleared of the other inmates and was holding it closed so that the Plaintiff could not go in even if he had tried to.

34) That about a minute or so after the MOVE IS CLOSED announcement was heard, Oberkramer told Macari to stop before they got caught.

35) That the Plaintiff looked up at Oberkramer and Macari as they were leaving and asked in a pleading way "WHY?" and was told: by Macari "You know why, you little dick licker!". Then they left.

36) That the Plaintiff then pulled himself up off of the floor after gathering his glasses and clip on shades, opened the door, stood there for a minute propping the door open with his body, then proceeded inside to his cube to sit down on his bed. He took off his coat and then looked at his cellie and said "How bad is it?"; to which he was told "Pretty bad, go look in the bathroom mirror.".

37) That after the Plaintiff looked in the bathroom mirror, he realized that he could not hide the remnants of the assault and battery that he had taken and went out to the stairwell landing to wait for Simmons to come back in. He had left his coat in his cubicle while he waited on the landing, hunched over the railing.

38) That at approximately 15:50, Simmons and his shift replacement, Correctional Officer McMonagle (McMonagle) entered the building and began ascending the stairs. Simmons got halfway up the stairs

before he saw the Plaintiff on the landing and began to chew the Plaintiff out for being out of bounds, to which the Plaintiff replied "I was just assaulted by another inmate."

39) Then Simmons asked where and the Plaintiff told him "right here on the landing during recall." Simmons then said "Oh, shit!, Now I'm going to have a shitload of paperwork to do." As they reached the top of the stairwell, McMonagle took charge, told the Plaintiff to go into to C/O's Office and began clearing the TV Rooms on both BA and BB sides of the Unit, sending them all back to their cubicles early to await the Four O'Clock Stand-Up Count.

40) Then Simmons told the Plaintiff that he would take him over to the Lieutenant's Office and asked if the Plaintiff could identify the attackers. The Plaintiff said he could identify one of them, that he hadn't seen the second one around before, and that they had both gone over to the BB side of B Unit. The Plaintiff also then told Simmons that he had taken off his coat and it was in his cubicle and that they may want it for evidence as it had blood on it. Simmons then escorted the Plaintiff to the cubicle to get the coat and back to the C/O's Office, took the coat, wrapped the "bed book" id's in the coat, handed it all to the Plaintiff and then escorted the Plaintiff to the Lieutenant's Office.

41) That Simmons had not placed Macari's card in the "bed book rack" after Macari's return from the SHU earlier that afternoon was evidenced later when it was subsequently brought to the Lieutenants' Office separately and the person bringing the card said that it was found on the desk in the B Unit C/O's Office.

42) That the Plaintiff was asked to go through the BB bed book rack and pick out his assailants after the Plaintiff was escorted to the Lieutenants' Office. The Plaintiff was also asked to write down a statement (description) of what had happened to him and then the Plaintiff had pictures taken of his head and torso from the waist up.

43) That the Plaintiff's coat, newly issued hat and gloves were all kept as evidence for a possible criminal proceeding. No criminal proceeding has taken place and three weeks later when the Plaintiff was released from the SHU, his coat, hat and gloves were nowhere to be found. The Plaintiff later learned that they had been destroyed and was issued a replacement coat, old and worn gloves and a used hat.

44) That the Plaintiff was only able to pick out Oberkramer's picture from the bed book rack was understandable later when it was discovered that Macari's card was not in the rack.

45) That Oberkramer was then brought to the Lieutenants' Office (LT's Office) for questioning and verified that he had threatened the Plaintiff at that earlier time, saying in his defense that the Plaintiff had interrupted a personal conversation between himself and another inmate. The Plaintiff stated that he had not, that the Plaintiff had been in the BA stairwell lobby area, that he had only answered a third inmate's question regarding the large number of callouts for education on the next day (a Sunday), which caused Oberkramer to flare up at the Plaintiff because he himself did not know the real reason for all of the callouts. That was when he threatened to put the Plaintiff's head through the door glass of the Large TV Room

door, turned around and saw the camera, and then made his statement about getting even by "fucking up" the Plaintiff at a time and place where there were no cameras.

46) That Lieutenant Butts, right there on the spot, informed the Plaintiff that because the Plaintiff was the cause of Oberkramer's retaliatory actions, there would probably be no charges brought against Oberkramer.

47) That Macari voluntarily turned himself in so that no other inmate would be mistakenly charged or even questioned about the actions of a deliberate assault and battery against the Plaintiff. Macari stated this himself in the LT's Office Lobby while the Plaintiff was listening to it from behind the doorway a yard or so away.

48) Macari also made the statement at that same time that he had told the B Unit Team that: "If they let me out of the SHU, I was going to beat the shit out of somebody.".

49) That after being interviewed in the LT's Office and pictures were taken, Oberkramer, Macari, and the Plaintiff were separately taken to the medical department where Nurse Folkwein charted the injuries, did a brief medical interview, and then the three were separately placed in the SHU.

50) That on October 20, 2008, at approximately 21:30 hours (night time count time before lights out), the Plaintiff had difficulty breathing (inhaling especially) and was taken to medical by C/O's Planey and Irwin as they were going off duty. Nurse Folkwein examined

the Plaintiff and determined that the Plaintiff needed a higher level of medical opinion than his level allowed.

51) That Nurse Folkwein was not able to reach the on-call doctor by pager or cell phone, and so he called an administrator of his department who declined to authorize a trip to an outside medical facility, but authorized instead a combination of Tylenol and Motrin for the Plaintiff's pain and breathing difficulties; sending the Plaintiff back to the SHU for the night without a medical doctor's examination, X-rays, or any other form of expert medical consultation. This treatment of the Plaintiff was deliberately indifferent to his medical needs over security concerns and expenses of a hospital trip.

52) That on October 22, 2008, the Plaintiff was taken to Medical for X-rays of his chest. While he was standing there in the hallway after the chest X-rays were done and still in a body chain, cuffed and shackled, the Plaintiff asked Nurse Tompko if haed X-rays were going to be done. He asked the Radiologist who said that there weren't anymore scheduled for the Plaintiff. The Plaintiff then pointed out to Nurse Tompko that the right side of his head was swollen and sore from the battery. He then had NP Zeller examine the Plaintiff and she then ordered a skull series of X-Rays on the spot, which were then done a few minutes later. The Plaintiff never received a full medical examination by an NP, a PA, or a Doctor for his injuries, deliberately indifferent to the Plaintiff's medical needs.

53) That the Plaintiff normally has telephone contact with his family approximately twice a week.

54) That the Plaintiff was not able to tell his family what had happened to him except in the form of a letter which they received approximately ten days after the battery occurred.

55) That on November 10, 2008, the Plaintiff was released from the SHU.

56) That subsequent to the battery, the Plaintiff was afflicted with Tinnitus and went to medical sick call. At his initial consultation for the Tinnitus, the Plaintiff was not charged a medical Co-Pay because it was related to the Battery to him.

57) That on a follow-up sick call visit reporting the Tinnitus, the Plaintiff was charged a $2.00 Co-Pay. The Plaintiff requested that the Co-Pay be refunded to him and has gone through all of the Administrative Procedures regarding the requested refund because it was related to the assault and battery of the Plaintiff, but was denied satisfaction at all levels. The Administrative Remedy Process has failed and now the Plaintiff bring suit for this related issue as well.

58) That the Federal Bureau of Prisons is not crediting inmate's who are charged the $ 2.00 Co-Pay towards the inmate's unpaid Fines and Restitutions as they are mandated to do by the United States Code section which established the $ 2.00 Co-Pay for medical visits and the funds are being removed from inmate trust fund accounts. Where is that money going?

59) That the Plaintiff attempted to submit Administrative Remedy Issues regarding Security Issues concerning Elkton and what happened to the Plaintiff on October 20, 2008, and was told the following things by Captain J. Fitzgerald (some in writing, some not):

A) That she is in charge of Security and that the Plaintiff would not be telling her how to do her job.

B) That what the Plaintiff was filing was leading to a lawsuit and that if he didn't stop she would ship him to an ADX facility, or better yet, to a USP where she knows he will get shanked and probably killed.

C) That yes, there was a policy or procedure in place in the Security Manual which should have prevented what happened to the Plaintiff from happening, putting that in writing so as to make it look like she settled the Plaintiff's Grievance.

D) That Captain Fitzgerald had read the Plaintiff's PSI and didn't care what happened to the Plaintiff at Elkton. This shows deliberate indifference of the head of the Elkton Security Department regarding the Plaintiff's Safety and Security.

60) That Lieutenant Butts had told the Plaintiff in December of 2008 that the assault and battery had been reported to the Federal Bureau of Investigation and that they had chosen not to bring charges against Macari. When the Plaintiff asked Lt. Butts for the local FBI Special Agent in Charge's name and address, the Lieutenant told him that he would have to dig it up and get back with the Plaintiff in a few days. The Lieutenant never did.

61) That the Plaintiff was able to get the address for the Cleveland FBI and began contact with them, requesting that charges be brought against Macari for a hate crime of Aggravated Assault and Battery on Federal Property against a protected person in accordance with the provisions of the United States Code. His request was denied.

62) That the refusal of the FBI to accept the Plaintiff's complaint and case without any investigation is in violation of the mandate by the United States Congress and the section of the United States Code which are the basis for the formation of the FBI.

63) That in February of 2009, the Plaintiff submitted a Federal Tort Claim in the amount of $1,000,000.00 through the Northeast Regional Office of the Federal Bureau of Prisons, which is presently before the United States District Court for the Northern District of Ohio.

64) That the Plaintiff was replaced in the SHU without reason on his Administrative Detention Order on March 5, 2009, and was held there until May 4, 2009, a period of sixty days.

65) That the Plaintiff wrote a letter to the Northeast Regional Counsel, Henry Sadowski, Esq., asking why his Due Process Rights were being violated.

66) That in April of 2009, Captain J. Fitzgerald, while making rounds in the SHU, yelled at the Plaintiff through his door and so loud that the inmates in the surrounding cells could hear clear as a bell: "You want to know why you're in here? You're in here because of the fuckin' Tort Claim you filed! That's why you're in here!" This is further evidence of a violation of both the Plaintiff's Due Process Rights and his Eighth Amendment Rights against Cruel and Unusual Punishment.

67) That the Plaintiff did not find out about the extreme violence in Macari's past until the evening of October 12, 2010.

68) That Attorney General Eric Holder was named as a Co-Defendant by the United States District Court for the

Northern District of Ohio when the Plaintiff filed his Federal Tort Claim for this case, and his Office oversees both the FBI and the FBoP.

69) That under the Theory of Respondeat Superior, Warden JT Shartle is the CEO of Elkton and is ultimately responsible for all of the actions of the employees and staff of Elkton.

70) That in an appointment following the Plaintiff's first release from the SHU around Thanksgiving of 2008, Dr. Lefever of the Elkton Psychology Department told the Plaintiff to buck and that he was safe here at Elkton. She was deliberately indifferent to the Psychological needs of the Plaintiff after the trauma he had experienced approximately a month before.

71) That "Chomo" is prison slang for child molester.

72) That Oberkramer has been involved in physical confrontations/altercations with at least two other "Chomo" inmates that the Plaintiff is aware of since the incident with the Plaintiff, and had a history of violent episodes in the FBoP before he arrived at Elkton from Forest City, Arkansas.

73) That the Plaintiff has been diagnosed with up to 30 percent hearing loss in both ears and has been given two hearing aids, one for each ear. The Government currently pays for Hearing Aid Batteries and Maintenance while the Plaintiff is a federal inmate.

74) That the Plaintiff has been diagnosed with Moderate to Severe Sleep Apnea and was recommended by the Sleep Study Clinic for a Bi-Pap machine but was only authorized for a C-Pap machine by the FBoP Elkton Medical staff because it is a cheaper machine to purchase.

75) That Elkton is overcrowded per the Federal Bureau of Prisons own Program Statement on Rated Capacity and more beds are continuing to be added in the sleeping dormitories.

76) That the overcrowding in the Elkton dormitories is a cause of the stress, tension, and other stress related problems.

77) That the Plaintiff subsequently filed a second Federal Tort Claim for his lost (misplaced) property from the March to May of 2009 trip to the SHU because he filed the first Tort Claim.

Note: The Plaintiff did not lose any personal property from his trip to the SHU after the battery.

78) That the Plaintiff has cause to believe that the named Co-Defendants in the above captioned case have violated his federal Due Process Rights and his Eighth Amendment Right against Cruel and Unusual Punishment under the color of law and in violation of 42 USC § 1983 as applied in the federal context by the United States Supreme Court in Bivens vs Six Unknown Agents.

V. **Relief**

(State briefly exactly what you want the court to do for you. Make no legal arguments. Do not give any legal arguments or cite any cases or statutes.)

1) Request an audit of the Medical Records Department and the Inmate Trust Fund Accounts throughout the Federal Bureau of Prisons to determine why the $2.00 Co-Pays are not being credited to fines and restitution payments as required by law.

2) Charge Captain J. Fitzgerald with Dereliction of Duty and making threats against Government Property (the Plaintiff). Also, personal and professional liability to the Plaintiff in the amount of two years of her gross salary in the BoP.

3) Charge Lieutenant Butts with making false statements and hold him personally and professionally liable in the amount of $75,000.

4) Charge the FBI with Dereliction of Duty and Conspiracy after the fact.

See Attached for rest of relief.

Signed this 19th day of October, 2010.

I declare under penalty of perjury that the foregoing is true and correct.

10/19/10 — Date

/s/ [ILLEGIBLE] — Signature of Plaintiff

5) Request that Nurse Folkwein be reprimanded for not authorizing a hospital trip for an assault and battery victim.

6) Request a refund of the $2.00 Co-Pay, a Reprimand and Retraining of Ms. J. Bunts (along with a thirty day suspension without pay), plus the payment of all court costs and filing fees for this action.

7) That Captain Fitzgerald should also be charged with interfering with Due Process.

8) Charge Ms. Newland with Dereliction of Duty, suspend her without pay for two weeks and send her away for retraining.

9) Charge Inmate Oberkramer with commission and accessory to commission of hate crimes using assault and battery to further the crime.

10) Charge Inmate Macari with First Degree Aggravated Assault and Battery for his premeditated act.

11) Charge those responsible for allowing Macari's release from the SHU with violations of 18 USC § 371, Conspriacy to Commit a premediated act of violence.

12) Lifetime medical attention, including doctors, dentists, hospital bills and equipment and the complete payment of all bills for replacement hearing aids, and all batteries and other related expenses to the Tinnitus and other related medical problems.

13) Correct medical equipment as specified by medical personnel be authorized to the Plaintiff during his lifetime.

14) That the Elkton Security issues be addressed and put into place to avoid more "stairwell" incidents.

15) That Elkton Staff review and correct/change as necessary, security posting assignments, criteria, and specifications.

16) Reduce the number of inmates at Elkton to 2 per cubicle.

17) Answer the Second Tort Claim.

III. Parties C

Name, Employed as, Employed by—

- Federal Bureau of Prisons t/d/b/a Federal Corrections Institution – Elkton, Not Applicable, United States Department of Justice
- Federal Inmate Peter B. Macari, Not Applicable, Not Applicable
- Federal Inmate Roger Oberkramer, Not Applicable, Not Applicable
- Captain J. Fitzgerald, Former Security Captain of FCI-Elkton, Federal Bureau of Prisons (FCI – Ft. Dix, NJ)
- Lieutenant Butts, FCI-Elkton SIS Security Lt., Federal Bureau of Prisons
- Correctional Officer Simmons, Correctional Officer, FCI-Elkton
- Ms. Bunts, FCI-Elkton Health Services Administrator, FCI-Elkton
- Doctor Lefever, former FCI-Elkton Psychology Department Staff Dr., Federal Bureau of Prisons
- Nurse Folkwein, Nurse, FCI-Elkton Medical Staff
- Ms. Newland, FCI-Elkton Unit Case Manager, FCI-Elkton
- Warden J.T. Shartle, Warder, FCI-Elkton (soon to be FCI-Fairton, NJ)
- Attorney General Eric Holder, Attorney General of the United States Department of Justice in Washington, D.C.

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO

Case No. 4:10 CV 2404
Judge John R. Adams

WALTER J. HIMMELREICH, PLAINTIFF

v.

FEDERAL BUREAU OF PRISONS, ET AL., DEFENDANTS

July 13, 2012

ORDER

This matter appears before the Court following an opinion issued by the Sixth Circuit that reversed, in part, this Court's dismissal of Himmelreich's complaint. Following that opinion, Himmelreich filed a motion requesting that service be performed by the U.S. Marshals Service. However, to the extent that Himmelreich seeks to compel service without completing the forms himself, his request is DENIED.

The Clerk of Courts shall provide Himmelreich the proper forms. Moreover, the Court notes that based upon the Sixth Circuit's opinion, only a limited number of Defendants remain in this matter. Accordingly, only Defendants J. Fitzgerald, Lieutenant Butts, Correctional Office Simmons, Ms. Bunts, and Ms. Newland may be served in this matter. The dismissal of all other Defendants was affirmed and there they will not be served in this matter.

IT IS SO ORDERED.

Date: July 13, 2012

/s/ JOHN R. ADAMS
JOHN R. ADAMS
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
(YOUNGSTOWN)

Docket No. 4:10-cv-00307-JRA

WALTER J. HIMMELREICH, PLAINTIFF

v.

UNITED STATES OF AMERICA, DEFENDANT

DOCKET ENTRIES

DATE	DOCKET NUMBER	PROCEEDINGS
2/11/10		Judge John R. Adams assigned to case. (C,BA) (Entered: 02/11/2010)
2/11/10	1	**Complaint** against United States of America. Filing fee not paid, IFP .. Filed by Walter J Himmelreich. Copy to plaintiff. (Attachments: # 1 Exhibits, # 2 Civil Cover Sheet) (C,BA) (Entered: 02/11/2010)
2/11/10		Random Assignment of Magistrate Judge pursuant to Local Rule 3.1. In the event of a referral, case will be assigned to Magistrate Judge Pearson. (C,BA) (Entered: 02/11/2010)
2/11/10	2	**Motion**(Certification of Prison Account) to proceed in forma pauperis filed by Plaintiff Walter J Him-

DATE	DOCKET NUMBER	PROCEEDINGS
		melreich. (C,BA) (Enteed: 02/11/2010)
3/22/10	3	**Order** granting plaintiff's Motion to proceed in forma pauperis (Related Doc # 2). The prison cashier shall deduct $12.27 from plaintiff's prisoner account. Thereafter, the prison cashier shall deduct 20% of the preceding months income each time the account exceeds $10.00 until the $350.00 filing fee is paid. Judge John R. Adams on 3/22/10.(K,C) (Entered: 03/22/2010)
3/22/10		Copy of 3 Order on Motion to proceed in forma pauperis mailed to Walter J. Himmelreich and the prison cashier on 3/22/10. Related document(s) 3 . (K,C) (Entered: 03/22/2010)
3/31/10		Original Summons, Complaint and Certified Order issued to U.S. Marshall for service upon United States of America. (R,Sh) (Entered: 03/31/2010)
4/21/10	4	Return of Service executed by U.S. Marshal by personal service upon United States of America on 4/20/2010 filed on behalf of Walter J Himmelreich (B,R) (Entered: 04/22/2010)
4/22/10		Partial filing fee in the amount of $12.27 received from Walter Him-

DATE	DOCKET NUMBER	PROCEEDINGS
		melreich. Receipt # 14660036726 (C,BA) (Entered: 04/22/2010)
4/29/10	5	Return of Service executed by U.S. Marshal by Certified Mail upon Bureau of Prisons on 4/21/10 filed on behalf of Walter J Himmelreich (B,R) (Entered: 04/30/2010)
5/3/10	6	Notice *of Appearance* filed by United States of America. (Johnson, Lisa) (Entered: 05/03/2010)
5/5/10	7	Return of Service executed by U.S. Marshal by Certified Mail upon U.S. Attorney General on 4/26/2010 filed on behalf of Walter J Himmelreich (B,R) (Entered: 05/05/2010)
5/13/10		Partial filing fee in the amount of $6.92 received from Walter Himmelreich. Receipt # 14660037190 (C,BA) (Entered: 05/13/2010)
6/7/10		Partial filing fee in the amount of $6.39 received from Walter Himmelreich. Receipt # 14660037633 (C,BA) (Entered: 06/07/2010)
6/10/10	8	Request for Discovery filed by Walter J Himmelreich. (K,K) (Entered: 06/10/2010)
6/16/10	9	**Motion** for extension of time until July 21, 2010 to respond to complaint filed by Defendant United

DATE	DOCKET NUMBER	PROCEEDINGS
		States of America. Related document(s) 1 . (Johnson, Lisa) (Entered: 06/16/2010)
6/18/10	10	**Motion** for temporary restraining order filed by Plaintiff Walter J Himmelreich. (Attachments: # 1 Prison Papers)(B,R) (Entered: 06/18/2010)
6/18/10	11	**Order** setting a Telephone Conference for 6/23/2010 at 01:00 PM in Courtroom 575 before Judge John R. Adams and directing the Warden of FCI Elkton to make plaintiff available for the conference. Judge John R. Adams on 6/18/10. (K,C) (Entered: 06/18/2010)
6/21/10	12	**Marginal Entry Order** granting defendant's 9 Motion for Extension of Time to answer. Responsive pleading is due 7/21/10. Judge John R. Adams on 6/21/10.(K,C) (Entered: 06/21/2010)
6/21/10		Copy of 12 Order on Motion for extension of time mailed to Walter Himmelreich on 6/21/10. Related document(s) 12 . (K,C) (Entered: 06/21/2010)
6/22/10	13	**Motion** in limine filed by Plaintiff Walter J Himmelreich. (Attachments: # 1 Exhibit)(B,R) (Entered: 06/22/2010)

DATE	DOCKET NUMBER	PROCEEDINGS
6/23/10		**Minutes of proceedings** [non-document] before Judge John R. Adams.Telephone Conference held on 6/23/10. (Court Reporter: None.)Time: 25 mins. (K,C) (Entered: 06/23/2010)
6/24/10	14	**Order and Decision** denying Plaintiff's Motion for a Temporary Restraining Order(Related Doc # 10). See order for details. Judge John R. Adams on 6/24/10.(L, J) Modified text on 6/25/2010 (R,Sh). (Entered: 06/24/2010)
6/24/10	15	**Marginal Entry Order** denying Plaintiff's Motion in limine (Related Doc # 13). Judge John R. Adams on 6/24/10.(L, J) (Entered: 06/24/2010)
6/24/10		Copy of 14 Order on Motion for Temporary Restraining Order, 15 Order on Motion in limine mailed to Walter J Himmelreich, #13152-067, Elkton FCI, P.O. Box 10, Lisbon, OH 44432 on June 24, 2010. Related document(s) 14 , 15 . (L, J) (Entered: 06/24/2010)
6/28/10	16	Letter addressed to Clerk regarding copy requests for subpoenas received after conference date. (R,Sh) (Entered: 06/29/2010)

DATE	DOCKET NUMBER	PROCEEDINGS
7/6/10	17	**Case Management Conference Scheduling Order** with case management conference to be held on 8/19/2010 at 12:00 PM at Courtroom 575 before Judge John R. Adams. Lead counsel and party representives to attend. Judge John R. Adams on 7/6/10. (Attachments: # 1 Report of Parties, # 2 Rule 30.1, # 3 Consent to Magistrate Judge, # 4 Budget, # 5 Policy and Procedure Manual)(K,C) (Entered: 07/06/2010)
7/6/10	18	**Order** directing the Warden of FCI Elkton to make plaintiff available by telephone for the Case Management Conference set for 8/19/10 at 12:00 noon. Judge John R. Adams on 7/2/10. (K,C) (Entered: 07/06/2010)
7/6/10		Copy of 18 Order and 17 Case Management Conference Scheduling Order, mailed to Walter J. Himmelreich on 7/6/10. Related document(s) 18 , 17 . (K,C) (Entered: 07/06/2010)
7/13/10	19	**Motion** to continue *Case Management Conference scheduled for August 19, 2010* until after August 26, 2010 filed by Defendant United States of America. Related docu-

DATE	DOCKET NUMBER	PROCEEDINGS
		ment(s) 17 . (Johnson, Lisa) Modified text on 7/14/2010 (R,Sh). (Entered: 07/13/2010)
7/21/10	20	**Answer** to 1 Complaint filed by United States of America. (Johnson, Lisa) (Entered: 07/21/2010)
7/22/10	21	Answer to Motion for Continuance filed by Walter J Himmelreich. Related document(s) 19 . (Attachments: # 1 Copies of letter) (B,R) (Entered: 07/22/2010)
7/22/10	22	**Order** granting Motion to continue Case Managment Conference (CMC) (Related Doc # 19) with case management conference to be held on 9/8/2010 at 01:00 PM at Courtroom 575 before Judge John R. Adams. Further, Himmelreich's request to attend the conference in person is denied. Parties are hereby excused from the requirement of preparing a report of parties' planning meeting. Proposed cut off dates shall be addressed during the CMC.. Judge John R. Adams on 7/22/2010.(R,Sh) (Entered: 07/22/2010)
7/23/10		Copy of 22 Order on Motion to continue, mailed to Walter Himmelreich on 7/23/10. Related docu-

DATE	DOCKET NUMBER	PROCEEDINGS
		ment(s) 22 . (R,Sh) (Entered: 07/23/2010)
7/23/10	23	**Motion** to alter judgment regarding the denial of the request for temporary restraining order and injunctive relief filed by Plaintiff Walter J Himmelreich. Related document(s) 14 . (B,R) Modified text on 7/26/2010 (H,KR). (Entered: 07/23/2010)
7/29/10	24	Response to Answer to Complaint filed by Walter J Himmelreich. Related document(s) 20 . (B,R) (Entered: 07/29/2010)
8/2/10	25	**Marginal Entry Order** denying plaintiff's Motion to alter/amend judgment (Related Doc # 23). Judge John R. Adams on 8/2/10.(K,C) (Entered: 08/02/2010)
8/2/10		Copy of 25 Order on Motion to alter/amend judgment mailed to Walter J. Himmelreich on 8/2/10. Related document(s) 25 . (K,C) (Entered: 08/02/2010)
8/11/10	26	**Order** rescheduling the case management conference to 9/13/2010 at 10:00 AM at Courtroom 575 before Judge John R. Adams. Judge John R. Adams on 8/11/10. (K,C) (Entered: 08/11/2010)

DATE	DOCKET NUMBER	PROCEEDINGS
8/12/10		Copy of 26 Order rescheduling CMC mailed to Walter J. Himmelreich on 8/12/2010. Related document(s) 26 . (R,Sh) Copy of order e-mailed to Warden at FCI Elkton on 8/12/10 (K,C). (Entered: 08/12/2010)
8/17/10	27	**NOTICE OF INTERLOCUTORY APPEAL** from the 25 Marginal Entry Order of 8/2/10 denying motion to alter judgment, filed by Walter J Himmelreich. Filing fee not paid. (H,SP) (Entered: 08/18/2010)
9/3/10	28	Acknowledgment from the USCA for Sixth Circuit of receipt of 27 Notice of Interlocutory Appeal (USCA# 10-4052). Date filed in USCA 8/31/10. (H,SP) (Entered: 09/03/2010)
9/13/10		**Minutes of proceedings** [non-document] before Judge John R. Adams.Case Management Conference held on 9/13/10. (Court Reporter: None.)Time: 25 mins. (K,C) (Entered: 09/14/2010)
9/23/10	29	**Order.** The Government is granted leave to file a motion to dismiss. The motion shall be filed no later than October 13, 2010. Plaintiff shall have thirty days to respond to

DATE	DOCKET NUMBER	PROCEEDINGS
		the motion. The Government shall reply within ten days. No discovery shall occur during the pendency of the motion to dismiss. Following resolution of the motion, the Court will set a status conference in the matter if necessary. Judge John R. Adams on 9/23/10. (R,Sh) (Entered: 09/23/2010)
9/23/10		Copy of 29 Order, mailed to Walter Himmelreich on 9/23/10. Related document(s) 29. (R,Sh) (Entered: 09/23/2010)
9/30/10	30	**Order** directing the plaintiff to pay the appeal fee of $455.00 in full or to submit a completed Financial Application within 30 days of this order. (Mailed to plaintiff on 9/30/10) Judge John R. Adams on 9/30/10. (K,C) (Entered: 09/30/2010)
10/13/10	31	**Motion** to dismiss filed by Defendant United States of America. Related document(s) 29 . (Attachments: # 1 Memorandum in Support of Motion to Dismiss, # 2 Declaration of Jason Streeval) (Johnson, Lisa) (Entered: 10/13/2010)
10/19/10	32	**Financial Application** for appeal, filed by Plaintiff Walter J Himmel-

DATE	DOCKET NUMBER	PROCEEDINGS
		reich(Related document(s) 30). (H,SP) (Entered: 10/20/2010)
11/10/10	33	Answer to 31 **Motion** to dismiss filed by Walter J Himmelreich. (B,R) (Entered: 11/10/2010)
11/18/10	34	**Memorandum of Opinion and Order**. Defendant's motion to dismiss is granted and the complaint is hereby dismissed. The Court certifies, pursuant to 28 U.S.C. § 1915(a)(3), that an appeal from this decision could not be taken in good faith. Judge John R. Adams on 11/18/10. (R,Sh) (Entered: 11/18/2010)
11/18/10	35	**Judgment Entry**. For the reasons set forth in the Memorandum Opinion filed contemporaneously with this Judgment Entry, the Government's motion to dismiss is granted and the complaint is hereby dismissed. Pursuant to 28 U.S.C § 1915(a)(3), the Court certifies that Plaintiff may not take an appeal from the Court's decision in good faith. Related document 34 . Judge John R. Adams on 11/18/10. (R,Sh) Modified text on 11/19/2010 (M,TL). (Entered: 11/18/2010)
11/18/10		Copy of 34 Order and Notice of Case Dismissal, 35 Order, mailed to Walter Himmelreich on 11/18/10.

DATE	DOCKET NUMBER	PROCEEDINGS
		Related document(s) 34 , 35 . (R,Sh) (Entered: 11/18/2010)
11/24/10	36	True copy of order from the USCA for the Sixth Circuit: The appeal is dismissed for want of prosecution re 27 . The proper fee was not paid by 11/1/10 (USCA# 10-4052). Date issued by USCA 11/24/10 (H,SP) (Entered: 11/24/2010)
11/30/10	37	**Motion** to alter or amend judgment under Federal Rule of Civil Procedure 59(e) and to reconsider the order of dismissal 34 , 35 filed by Plaintiff Walter J Himmelreich. (B,R) Modified text and created links on 12/1/2010 (P,G). (Entered: 11/30/2010)
12/2/10	38	**Marginal Entry Order** denying Plaintiff's Motion to alter/amend judgment (Related Doc # 37). Judge John R. Adams on 12/2/10. (R,Sh) (Entered: 12/02/2010)
12/2/10		Copy of 38 Order on Motion to alter/amend judgment mailed to Walter Himmelreich on 12/2/10. Related document(s) 38 . (R,Sh) (Entered: 12/02/2010)
12/10/10	39	**NOTICE OF APPEAL** to the 6th Circuit Court of Appeals from the 38 Marginal Entry Order of 12/2/10, filed by Walter J Himmelreich.

DATE	DOCKET NUMBER	PROCEEDINGS
		Filing fee not paid. (H,SP) (Entered: 12/10/2010)
12/23/10	40	Acknowledgment from the USCA for Sixth Circuit of receipt of 39 Notice of Appeal (USCA# 10-4593). Date filed in USCA 12/22/10. (H,SP) (Entered: 12/23/2010)
2/10/11		Partial filing fee in the amount of $8.32 received from Walter Himmelreich. Receipt # 14660042827 (C,BA) (Entered: 02/10/2011)
3/7/11		Partial filing fee in the amount of $5.92 received from Walter Himmelreich. Receipt # 14660043391 (C,BA) (Entered: 03/07/2011)
4/11/11		Partial filing fee in the amount of $3.92 received from Walter Himmelreich. Receipt # 14660044162 (C,BA) (Entered: 04/11/2011)
5/9/11		Partial filing fee in the amount of $6.32 received from Walter Himmelreich. Receipt # 14660044711 (C,BA) (Entered: 05/09/2011)
5/20/11	41	Order of USCA for the Sixth Circuit: Granting appellant's motion to reinstate the appeal re 27 (USCA# 10-4052). Date issued by USCA 5/17/11 (H,SP) (Entered: 05/20/2011)
5/20/11	42	True Copy of order from the USCA for the Sixth Circuit: Dismissing

DATE	DOCKET NUMBER	PROCEEDINGS
		the appeal re 27 , and the motion for leave to proceed in forma pauperis is denied as moot (USCA# 10-4052). Circuit Judges: Batchelder, Kennedy and Sutton. Date issued by USCA 5/19/11 (H,SP). Modified text on 3/7/2012 (H,SP). (Entered: 05/20/2011)
6/13/11		Partial filing fee in the amount of $12.78 received from Walter Himmelreich. Receipt # 14660045496 (C,BA) (Entered: 06/13/2011)
7/11/11		Partial filing fee in the amount of $15.90 received from Walter Himmelreich. Receipt # 14660046099 (C,BA) (Entered: 07/11/2011)
9/6/11	43	**Marginal Entry Order** denying as moot plaintiff's Motion to appeal in forma pauperis (Related Doc # 32). Judge John R. Adams on 9/6/11.(R,Sh) (Entered: 09/06/2011)
10/24/11		Partial Filing fee in the amount of $17.92 received from Walter Himmelreich. Receipt # 14660048279. (C,B) (Entered: 11/08/2011)
1/9/12		Partial filing fee in the amount of $16.18 received from Walter Himmelreich. Receipt # 14660049844 (C,BA) (Entered: 01/09/2012)

DATE	DOCKET NUMBER	PROCEEDINGS
2/9/12		Partial filing fee in the amount of $15.52 received from Walter Himmelreich. Receipt # 14660050575 (C,BA) (Entered: 02/09/2012)
3/7/12	44	True copy of order from the USCA for the Sixth Circuit: The appeal is dismissed for want of prosecution re 39 . The proper fee was not paid by 3/5/12 (USCA# 10-4593). Date issued by USCA 3/6/12 (H,SP) (Entered: 03/07/2012)
4/10/12		Partial filing fee in the amount of $13.92 received from Walter Himmelreich. Receipt # 14660051935 (C,BA) (Entered: 04/10/2012)
6/11/12		Partial filing fee in the amount of $13.57 received from Walter Himmelreich. Receipt # 14660053367 (C,BA) (Entered: 06/11/2012)
7/9/12		Partial Filing fee in the amount of $17.39 received from Walter Himmelreich. Receipt # 14660053939. (C,B) (Entered: 07/24/2012)
7/26/12	45	**Motion** to recall judgment under the provisions of Federal Rule of Civil Procedure 60 (a) (b) (4) and (6) (d) (1) filed by Plaintiff Walter J Himmelreich. (Attachments: # 1 Attachment 1: Documentation Regarding Rule 60)(B,B) (Entered: 07/26/2012)

DATE	DOCKET NUMBER	PROCEEDINGS
8/7/12		Partial Filing fee in the amount of $14.78 received from Walter Himmelreich. Receipt # 14660054523. (C,B) (Entered: 08/10/2012)
8/9/12	46	**Opposition** to 45 **Motion** to Recall Judgment filed by United States of America. (Attachments: # 1 Exhibit 1—Order 6th Circuit Court of Appeals 5.7.12)(Johnson, Lisa) Modified text on 8/10/2012 (M,TL). (Entered: 08/09/2012)
8/24/12	47	Answer to government's 45 response in opposition to 45 motion to recall judgment filed by Walter J Himmelreich. (Attachments: # 1 Exhibits—Copies of partial orders) (E,P) Modified text, added links and regenerated NEF on 8/27/2012 (M,TL). (Entered: 08/24/2012)
8/30/12	48	**Order** denying Plaintiff's Motion to vacate (recall judgment) (Related Doc # 45). The court certifies, pursuant to 28 U.S.C. § 1915(a)(3), that an appeal from this decision could not be taken in good faith. Judge John R. Adams on 8/30/12.(L,J) Modified text on 8/31/2012 (M,TL). Modified text 9/11/2012 (C,KA). (Entered: 08/30/2012)

DATE	DOCKET NUMBER	PROCEEDINGS
8/30/12		Copy of 48 Order on Motion to vacate mailed to Walter J. Himmelreich at #13152-067, FCI–Elkton, P.O.Box 10, Lisbon, OH 44432 on 8/30/12. Related document(s) 48 . (L,J) (Entered: 08/30/2012)
9/11/12	49	**NOTICE OF APPEAL** to the Sixth Circuit Court of Appeals from the 48 Order of 8/30/12, filed by Walter J Himmelreich. Filing fee not paid (C,KA). Modified text on 9/12/2012 (H,SP). (Entered: 09/11/2012)
9/13/12	50	**Order** that Plaintiff shall pay the full appeal fee of $455.00 or submit a completed Financial Application to the Court within 30 days of this order. Judge John R. Adams on 9/13/12. (K,C) (Entered: 09/13/2012)
9/13/12		Copy of 50 Order mailed to Walter J. Himmelreich at FCI Elkton on 9/13/12. Related document(s) 50 . (K,C) (Entered: 09/13/2012)
9/13/12		Partial Filing fee in the amount of $14.78 received from Walter Himmelreich. Receipt# 14660055384 (C,B). Modified typo on 9/28/2012 (H,SP). (Entered: 09/18/2012)
9/28/12	51	Acknowledgment from the USCA for Sixth Circuit of receipt of 49

DATE	DOCKET NUMBER	PROCEEDINGS
		Notice of Appeal (USCA# 12-4142). Date filed in USCA 9/26/12. (H,SP) (Entered: 09/28/2012)
9/28/12	52	**Financial Application** for appeal, filed by Plaintiff Walter J Himmelreich(Related document(s) 50). (Attachments: # 1 Inmate Statement) (H,SP) (Entered: 10/01/2012)
10/10/12		Partial filing fee in the amount of $17.39 received from Walter Himmelreich. Receipt # 14660055936 (C,BA) (Entered: 10/10/2012)
10/11/12	53	**Order** granting Plaintiff's Motion to appeal in forma pauperis (Related Doc # 52). The total fee due for this appeal is $455. Further, an initial partial fee in the amount of $15.64 is due and should be deducted from plaintiff's prisoner account, when funds are available therein, until the initial partial fee is paid. Thereafter, the prison cashier's office shall deduct, and forward to the court, 20% of the preceding month's income credited to the prisoner's account each time the amount in the account exceeds $10.00 until the full fee has been paid. Judge John R. Adams on

DATE	DOCKET NUMBER	PROCEEDINGS
		10/11/12.(R,Sh) (Entered: 10/11/2012)
10/11/12		Copy of 53 Order on Motion to appeal in forma pauperis,, mailed to Walter Himmelreich, Elkton Cashier's Office and Clerk, Sixth Circuit Court of Appeals on 10/11/12. Related document(s) 53 . (R,Sh) (Entered: 10/11/2012)
11/14/12		Partial Filing fee in the amount of $14.96 received from Walter Himmelreich. Receipt # 14660056674. (C,B) (Entered: 11/14/2012)
11/20/12		Partial Appeal Fee in the amount of $15.64 received from Walter Himmelreich. Receipt # 14660056787 (S,R) (Entered: 11/20/2012)
12/7/12		Partial Filing fee in the amount of $2.78 received from Walter Himmelreich. Receipt # 14660057218. (C,B) (Entered: 12/14/2012)
12/11/12		Partial Filing fee in the amount of $13.14 received from Walter Himmelreich. Receipt # 14660057262. (C,B) (Entered: 12/11/2012)
1/11/13		Partial filing fee in the amount of $6.18 received from Walter Himmelreich. Receipt # 14660057961 (C,BA) (Entered: 01/11/2013)
1/15/13		Partial filing fee in the amount of $12.41 received from Walter Him-

DATE	DOCKET NUMBER	PROCEEDINGS
		melreich. Receipt # 14660058019 (C,BA) (Entered: 01/15/2013)
3/12/13		Partial filing fee in the amount of $9.92 received from Walter Himmelreich. Receipt # 14660059344 (C,BA) (Entered: 03/12/2013)
4/9/13		Partial filing fee in the amount of $11.12 received from Walter Himmelreich. Receipt # 14660059991 (C,BA) (Entered: 04/09/2013)
5/9/13		Partial filing fee in the amount of $3.92 received from Walter Himmelreich. Receipt # 14660060680 (C,BA) (Entered: 05/09/2013)
5/29/13	54	Information copy of order from the USCA for the Sixth Circuit: Affirming the District Court's order denying the motion for relief from judgment re 49 Notice of Appeal, the motion to stay is denied (USCA# 12-4142). This is not a mandate order. Circuit Judges: Martin, Gilman and Kethledge. Date issued by USCA 5/29/13 (H,SP) (Entered: 05/29/2013)
6/11/13		Partial Filing fee in the amount of $8.49 received from Walter Himmelreich. Receipt # 14660061417. (C,B) (Entered: 06/11/2013)
7/10/13		Partial Filing fee in the amount of $9.39 received from Walter Him-

DATE	DOCKET NUMBER	PROCEEDINGS
		melreich. Receipt # 14660062109. (C,B) (Entered: 07/17/2013)
7/26/13	55	True copy of mandate from the USCA for the Sixth Circuit: Affirming the District Court's order re 49 Notice of Appeal (USCA# 12-4142). Date issued as mandate 7/25/13, Costs: None (Related document 54) (H,SP) (Entered: 07/26/2013)
8/12/13		Partial filing fee in the amount of $4.18 received from Walter Himmelreich. Receipt # 14660062931 (C,BA) (Entered: 08/12/2013)
1/14/14		Partial filing fee in the amount of $7.40 received from Walter Himmelreich. Receipt # 14660066519 (C,BA) (Entered: 01/14/2014)
2/11/14		Partial filing fee in the amount of $12.60 received from Walter Himmelreich. Receipt # 14660067232 (C,BA) (Entered: 02/11/2014)
3/13/14		Partial filing fee in the amount of $10.16 received from Walter Himmelreich. Receipt # 14660068097 (C,BA) (Entered: 03/13/2014)
4/10/14		Partial filing fee in the amount of $11.18 received from Walter Himmelreich. Receipt # 14660068745 (C,BA) (Entered: 04/10/2014)

DATE	DOCKET NUMBER	PROCEEDINGS
5/13/14		Partial filing fee in the amount of $4.00 received from Walter Himmelreich. Receipt # 14660069467 (C,BA) (Entered: 05/13/2014)
6/11/14		Partial Filing fee in the amount of $50.00 received from Walter Himmelreich. Receipt # 14660070131. (C,B) (Entered: 06/16/2014)
7/11/14		Partial filing fee in the amount of $14.90 received from Walter Himmelreich. Receipt # 14660070798 (C,BA) (Entered: 07/11/2014)
8/12/14		Partial filing fee in the amount of $37.76 received from Walter Himmelreich. Receipt # 14660071481 (C,BA) (Entered: 08/12/2014)
9/15/14		Partial filing fee in the amount of $32.32 received from Walter Himmelreich. Receipt # 14660072259 (C,BA) (Entered: 09/15/2014)
10/10/14		Partial Filing fee in the amount of $12.76 received from Walter Himmelreich. Receipt # 14660072826. (C,B) (Entered: 10/24/2014)
11/12/14		Partial filing fee in the amount of $18.08 received from Walter Himmelreich. Receipt # 14660073535 (C,BA) (Entered: 11/12/2014)
12/9/14		Partial filing fee in the amount of $12.20 received from Walter Him-

DATE	DOCKET NUMBER	PROCEEDINGS
		melreich. Receipt # 14660074196 (C,BA) (Entered: 12/09/2014)
1/21/15		Partial filing fee in the amount of $14.08 received from Walter Himmelreich. Receipt # 14660075079 (C,BA) (Entered: 01/21/2015)
2/23/15		Partial filing fee in the amount of $17.32 received from Walter Himmelreich. Receipt # 14660075840 (C,BA) (Entered: 02/23/2015)
3/12/15		Partial filing fee in the amount of $8.24 received from Walter Himmelreich. Receipt # 14660076348 (C,BA) (Entered: 03/12/2015)
4/14/15		Partial filing fee in the amount of $13.01 received from Walter Himmelreich. Receipt # 14660077087 (C,BA) (Entered: 04/14/2015)
5/13/15		Partial filing fee in the amount of $1.52 received from Walter Himmelreich. Receipt # 14660077722. (O,K) (Entered: 05/13/2015)
6/16/15		Partial filing fee in the amount of $8.88 received from Walter Himmelreich. Receipt # 14660078460 (C,BA) (Entered: 06/16/2015)
8/11/15		Partial filing fee in the amount of $30.04 received from Walter Himmelreich. Receipt # 14660079626 (C,BA) (Entered: 08/11/2015)

DATE	DOCKET NUMBER	PROCEEDINGS
8/11/15		Partial filing fee in the amount of $8.88 received from Walter Himmelreich. Receipt # 14660079629 (C,BA) (Entered: 08/11/2015)
9/9/15		Partial filing fee in the amount of $8.58 received from Walter Himmelreich. Receipt # 14660080237 (C,BA) (Entered: 09/09/2015)
10/9/15		Partial filing fee in the amount of $9.44 received from Walter Himmelreich. Receipt # 14660080999 (C,BA) (Entered: 10/09/2015)

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. 4:10CV0307

WALTER HIMMELREICH, PLAINTIFF

v.

UNITED STATES OF AMERICA, DEFENDANT

[Filed: Feb. 11, 2010]

Appeal of Denial of Administrative Tort Claim Number TRT-NER-2009-02319 Under 28 USC § 2672

Now comes the Plaintiff, Walter Himmelreich, Pro Se, and Appeals the Denial of the Administrative Tort Claim (attached) to this Honorable Court and claims that the answers that the Regional Counsel for the Northeast Region of the Federal Bureau of Prisons are in dispute as to their accuracy and validity.

Respectfully submitted,

/s/ WALTER HIMMELREICH
WALTER HIMMELREICH, PRO SE
Federal Register No. 13152-067
Federal Correctional Institution-Elkton
P.O. Box 10
Lisbon, OH 44432

Certification

I, Walter Himmelreich, Pro Se Plaintiff, certify that the above statement is true and correct under penalty of perjury, 28 USC § 1746 and that I am placing this in the FCI-Elkton Prison Legal Mail on February 9, 2010, in accord with the prison mailbox filing rules.

Respectfully,

/s/ WALTER HIMMELREICH
WALTER HIMMELREICH

UNITED STATES GOVERNMENT

Memorandum

Northeast Regional Office, Philadelphia, PA
FEDERAL BUREAU OF PRISONS

DATE : Aug. 10, 2009

REPLY TO ATTN OF : HENRY J. SADOWSKI
Henry J. Sadowski, Regional Counsel

SUBJECT: Administrative Tort Claim No. TRT-NER-2009-02319

TO : Walter Himmelreich, Reg. No. 13152-067
FCI Elkton

Your Administrative Tort Claim No. TRT-NER-2009-02319, properly received by this agency on February 11, 2009, has been considered for settlement as provided by the Federal Tort Claims Act (FTCA) 28 U.S.C. § 2672, under authority delegated to me by 28 C.F.R. § 543.30. You seek $1,000,000.00 for alleged harm caused by an assault you suffered on October 20, 2008 while at the Federal Correctional Institution (FCI) Elkton. Specifically, you allege staff neglect and claim staff were aware the inmate was going to assault you.

After careful review of this claim, I have decided not to offer a settlement. Investigation reveals there is no evidence to suggest your assailant ever told staff he was going to assault you or that staff had any prior knowledge you were going to be assaulted. You received appropriate medical care following the assault, and there is no evidence to suggest you experienced a compensable loss as the result of negligence on the

part of any Bureau of Prisons' employee. Accordingly, your claim is denied.

If you are dissatisfied with this decision, you may bring an action against the United States in an appropriate United States District Court within six (6) months of the date of this memorandum.

cc: J. T. Shartle, Warden, FCI Elkton

ACKNOWLEDGMENT OF RECEIPT

DENIAL OF TORT CLAIM

I, Walter Himmelreich, Reg. No. 13152-067, hereby acknowledge receipt of this 14 day of August, 2009, of the August 10, 2009 memorandum from Henry J. Sadowski, Regional Counsel, Northeast Region, Federal Bureau of Prisons, informing me of the denial of my tort claim (TRT-NER-2009-02319).

/s/ ILLEGIBLE
Signature

Witnessed this 14 day of August, 2009.

/s/ ILLEGIBLE
Staff Witness

CLAIM FOR DAMAGE, INJURY, OR DEATH

INSTRUCTIONS: Please read carefully the instructions on the reverse side and supply information requested on both sides of the form. Use additional sheet(s) if necessary. See reverse side for additional instructions.

FORM APPROVED OMB NO. 1105-0008

1. Submit To Appropriate Federal Agency:

Mid-Atlantic Regional Office Legal Department
Customs House, 7th Floor
2nd and Chestnut Streets
Philadelphia, Pennsylvania 19106

2. [illegible] Hundreds

Federal Correctional Institution Elkton
P. O. BOX 10
Lisbon, OH 44432
Unit 6A

3. [illegible] 4. DATE OF BIRTH: March 22, 1972 5. MARITAL STATUS: Single 6. DATE AND DAY OF ACCIDENT: October 28, 2008 (Monday) 7. TIME (A.M. or P.M.): 15:25 PM

8. Basis of Claim (State in detail the known facts and circumstances attending the damage, injury, or death, identifying persons and property involved, the place of occurrence and the cause thereof) (Use additional pages if necessary.)

I was intentionally assaulted by inmate Peter Macori after he told staff member(s) that it was his intention. He told the security staff that he had told the Unit Team this intention (within the hearing of the claimant) immediately after the incident while being interviewed within the Lieutenant's Office/Lobby area. See Basis of Claim attached regarding injuries.

PROPERTY DAMAGE

9a. NAME AND ADDRESS OF OWNER, IF OTHER THAN CLAIMANT (Number, street, city, State, and Zip Code)

N/A

9b. BRIEFLY DESCRIBE THE PROPERTY, NATURE AND EXTENT OF DAMAGE AND THE LOCATION WHERE PROPERTY MAY BE INSPECTED. (See instructions on reverse side.)

N/A

PERSONAL INJURY/WRONGFUL DEATH

10. STATE NATURE AND EXTENT OF EACH INJURY OR CAUSE OF DEATH, WHICH FORMS THE BASIS OF THE CLAIM. IF OTHER THAN CLAIMANT, STATE NAME OF INJURED PERSON OR DECEDENT.

See Basis of Claim attached.

WITNESSES

11. NAME	ADDRESS (Number, street, city, State, and Zip Code)
See Bureau of Prisons FCI-Elkton Incident Report and Records	

12. (See instructions on reverse) AMOUNT OF CLAIM (in dollars)

12a. PROPERTY DAMAGE	12b. PERSONAL INJURY	12c. WRONGFUL DEATH	12d. TOTAL (Failure to specify may cause forfeiture of your rights.)
N/A	$1,000,000.00 Bodily Injury plus punitive damages		$1,000,000.00 +

13a. SIGNATURE OF CLAIMANT (See instructions on reverse side.)

13b. Phone number of signatory: N/A

14. DATE OF CLAIM: February 9, 2009

CERTIFY THAT THE AMOUNT OF CLAIM COVERS ONLY DAMAGES AND INJURIES CAUSED BY THE ACCIDENT ABOVE AND AGREE TO ACCEPT SAID AMOUNT IN FULL SATISFACTION AND FINAL SETTLEMENT OF THIS CLAIM.

CIVIL PENALTY FOR PRESENTING FRAUDULENT CLAIM

The claimant shall forfeit and pay to the United States the sum of $2,000 plus double the amount of damages sustained by the United States. (See 31 U.S.C. 3729.)

CRIMINAL PENALTY FOR PRESENTING FRAUDULENT CLAIM OR MAKING FALSE STATEMENTS

Fine of not more than $10,000 or imprisonment for not more than 5 years or both. (See 18 U.S.C. 287, 1001.)

95-109

NSN 7540-00-634-4046

STANDARD FORM 95 (Rev. 7-85) PRESCRIBED BY DEPT. OF JUSTICE 28 CFR 14.3

PRIVACY ACT NOTICE

No notice is provided in accordance with the Privacy Act, 5 U.S.C. [illegible]. I consent the information requested in the letter to which this Notice is attached

. Authority: This requested information is solicited pursuant to one or more of the following: 5 U.S.C. 301, 28 U.S.C. 501 et seq., 28 U.S.C. 2671 et seq., 28 C.F.R.

B. *Principal Purpose*: The information requested is to be used in evaluating claims.

C. *Routine Use*: See the Notices of Systems of Records for the agency to whom you are submitting this form for this information.

D. *Effect of Failure to Respond*: Disclosure is voluntary. However, failure to supply the requested information or to execute the form may render your claim

INSTRUCTIONS

Complete all items - Insert the word NONE where applicable

CLAIM SHALL BE DEEMED TO HAVE BEEN PRESENTED WHEN A FEDERAL AGENCY RECEIVES FROM A CLAIMANT, HIS DULY AUTHORIZED AGENT, OR LEGAL REPRESENTATIVE AN EXECUTED STANDARD FORM 95 OR OTHER WRITTEN NOTIFICATION OF AN INCIDENT, ACCOMPANIED BY A CLAIM FOR MONEY DAMAGES IN A SUM CERTAIN FOR INJURY TO OR LOSS OF PROPERTY, PERSONAL INJURY, OR DEATH ALLEGED TO HAVE OCCURRED BY REASON OF THE INCIDENT. THE CLAIM MUST BE PRESENTED TO THE APPROPRIATE FEDERAL AGENCY WITHIN TWO YEARS AFTER THE CLAIM ACCRUES.

Any instructions or information necessary in the preparation of your claim will be furnished, upon request, by the office indicated in item #1 on the reverse side. Certain regulations pertaining to claims asserted under the Federal Tort Claims Act can be found in Title 28, Code of Federal Regulations, Part 14. Many agencies have published supplemental regulations also. If more than one agency is involved, please state each agency.

The claim may be filed by a duly authorized agent or other legal representative, provided satisfactory evidence is submitted with said claim establishing express authority to act for the claimant. A claim presented by an agent or legal representative must be presented in the name of the claimant. If the claim is signed by the agent or legal representative, it must show the title or legal capacity of the person signing and be accompanied by evidence of his/her authority to present a claim on behalf of the claimant as agent, executor, administrator, parent, guardian or other representative.

If claimant intends to file claim for both personal injury and property damage, claim for both must be shown in item 12 of this form.

The amount claimed should be substantiated by competent evidence as follows:

(a) In support of claim for personal injury or death, the claimant should submit a written report by the attending physician, showing the nature and extent of injury, the nature and extent of treatment, the degree of permanent disability, if any, the prognosis, and the period of hospitalization, or incapacitation, attaching itemized bills for medical, hospital, or burial expenses actually incurred.

(b) In support of claim for damage to property which has been or can be economically repaired, the claimant should submit at least two itemized signed statements or estimates by reliable, disinterested concerns, or, if payment has been made, the itemized signed receipt evidencing payment.

(c) In support of claim for damage to property which is not economically reparable, or if the property is lost or destroyed, the claimant should submit statements as to the original cost of the property, the date of purchase, and the value of the property, both before and after the accident. Such statements should be by disinterested competent persons, preferably reputable dealers or officials familiar with the type of property damaged, or by two or more competitive bidders, and should be certified as being just and correct.

(d) Failure to completely execute this form or to supply the requested material within two years from the date the allegations accrued may render your claim "invalid". A claim is deemed presented when it is received by the appropriate agency, not when it is mailed.

Failure to specify a sum certain will result in invalid presentation of your claim and may result in forfeiture of your rights.

Public reporting burden for this collection of information is estimated to average 15 minutes per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden,

to: Director, Torts Branch
Civil Division
U.S. Department of Justice
Washington, DC 20530

and to the
Office of Management and Budget
Paperwork Reduction Project (1105-0008)
Washington, DC 20503

INSURANCE COVERAGE

In order that subrogation claims may be adjudicated, it is essential that the claimant provide the following information regarding the insurance coverage of his vehicle or property.

15. Do you carry accident insurance? ☐ Yes, If yes, give name and address of insurance company (Number, street, city, State, and Zip Code) and policy number ☐ No

N/A

16. Have you filed claim on your insurance carrier in this instance, and if so, is it full coverage or deductible?

N/A

17. If deductible, state amount

N/A

18. If claim has been filed with your carrier, what action has your insurer taken or proposes to take with reference to your claim? (It is necessary that you ascertain these facts)

N/A

19. Do you carry public liability and property damage insurance? ☐ Yes, If yes, give name and address of insurance company (Number, street, city, State, and Zip Code) ☐ No

N/A

SF 95 (Rev. 7-85) BACK

Basis of Claim

On October 29, 2008, at approximately 15:25 PM, during the recall of inmates to their respective housing units, the claimant, Walter T. Himmelreich, was battered and severely beaten in the skull and upper body by inmate Peter Macari. Claimant Himmelreich suffered external injuries from the beating with at least one permanent scar as a daily reminder of the attack. Claimant Himmelreich also suffered internal bruising and swelling and is suffering from a permanent ringing in the ears since the attack. Claimant Himmelreich has also suffered from intermittent headaches, and is currently being treated for a pinched nerve in the area of the body which was battered during the attack. The medical department has also ordered a CT Scan to assess possible nervous system damage. Claimant Himmelreich is also currently waiting to be seen by the dental staff regarding sensitive teeth in the upper left side of his mouth which only became sensitive since the beating. The sensitive teeth are almost directly under the permanent scar. Claimant Himmelreich has also been seen by Drs. Clifford and Lefever (psychology staff) regarding the beating. The medical records will show that Claimant Himmelreich was treated for difficulty breathing approximately 6 hours after the beating, separate from other medical treatment

U.S. DEPARTMENT OF JUSTICE — REQUEST FOR ADMINISTRATIVE REMEDY

Type or use ball-point pen. If attachments are needed, submit four copies. Additional instructions on reverse.

From: Himmelreich, Walter J (LAST NAME, FIRST, MIDDLE INITIAL) 13152-067 (REG. NO.) BA (UNIT) FCI-Elkton (INSTITUTION)

Part A- INMATE REQUEST

On 10/20/08, I was intentionally physically assaulted by another inmate, who had stated that he would assault (battery) another inmate to staff member(s) prior to the incident. A preventative policy should be in place to safeguard inmates when this situation arises in the future and adhered to. This is a recommendation, suggestion, for the future protection of other inmates, not a directive or order (as previously hinted at in the prior staff response (9½). If a policy is in place, it might be re-evaluated to determine its effectiveness.

December 1, 2008 (DATE) _____ (SIGNATURE OF REQUESTER)

Part B- RESPONSE

Yes there is a policy in place.

_____ Reg # 13152-067

Copy received Feb 4, 2009, 20:55PM. _____

Internally Routed. _____

_____ (DATE) _____ (WARDEN OR REGIONAL DIRECTOR)

If dissatisfied with this response, you may appeal to the Regional Director. Your appeal must be received in the Regional Office within 20 calendar days of the date of this response.

ORIGINAL: RETURN TO INMATE CASE NUMBER: 518482-F1

Part C- RECEIPT CASE NUMBER: _____

Return to: _____ (LAST NAME, FIRST, MIDDLE INITIAL) _____ (REG. NO.) _____ (UNIT) _____ (INSTITUTION)

SUBJECT: _____

2-8-09 (DATE) _____ (RECIPIENT'S SIGNATURE (STAFF MEMBER))

USP LVN

CIVIL COVER SHEET

I. (a) PLAINTIFFS

WALTER HUMMELBEACH

(b) County of Residence of First Listed Plaintiff

(EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorneys (Firm Name, Address, and Telephone Number)

DEFENDANTS

USA

County of Residence of First Listed Defendant

(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.

Attorneys (If Known)

4:10CV0337

JUDGE ADAMS

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- ☐ 1 U.S. Government Plaintiff
- ☐ 3 Federal Question (U.S. Government Not a Party)
- ☒ 2 U.S. Government Defendant
- ☐ 4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant; For Diversity Cases Only)

	PTF	DEF		PTF	DEF
Citizen of This State	☐ 1	☐ 1	Incorporated or Principal Place of Business In This State	☐ 4	☐ 4
Citizen of Another State	☐ 2	☐ 2	Incorporated and Principal Place of Business In Another State	☐ 5	☐ 5
Citizen or Subject of a Foreign Country	☐ 3	☐ 3	Foreign Nation	☐ 6	☐ 6

IV. NATURE OF SUIT (Place an "X" in One Box Only)

CONTRACT	TORTS		FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES
☐ 110 Insurance ☐ 120 Marine ☐ 130 Miller Act ☐ 140 Negotiable Instrument ☐ 150 Recovery of Overpayment & Enforcement of Judgment ☐ 151 Medicare Act ☐ 152 Recovery of Defaulted Student Loans (Excl. Veterans) ☐ 153 Recovery of Overpayment of Veteran's Benefits ☐ 160 Stockholders' Suits ☐ 190 Other Contract ☐ 195 Contract Product Liability ☐ 196 Franchise	PERSONAL INJURY ☐ 310 Airplane ☐ 315 Airplane Product Liability ☐ 320 Assault, Libel & Slander ☐ 330 Federal Employers' Liability ☐ 340 Marine ☐ 345 Marine Product Liability ☐ 350 Motor Vehicle ☐ 355 Motor Vehicle Product Liability ☐ 360 Other Personal Injury PERSONAL INJURY ☐ 362 Personal Injury - Med. Malpractice ☐ 365 Personal Injury - Product Liability ☐ 367 Health Care/ Pharmaceutical Personal Injury Product Liability ☐ 368 Asbestos Personal Injury Product Liability PERSONAL PROPERTY ☐ 370 Other Fraud ☐ 371 Truth in Lending ☐ 380 Other Personal Property Damage ☐ 385 Property Damage Product Liability		☐ 610 Agriculture ☐ 620 Other Food & Drug ☐ 625 Drug Related Seizure of Property 21 USC 881 ☐ 630 Liquor Laws ☐ 640 R.R. & Truck ☐ 650 Airline Regs ☐ 660 Occupational Safety/Health ☐ 690 Other LABOR ☐ 710 Fair Labor Standards Act ☐ 720 Labor/Mgmt. Relations ☐ 740 Labor Railway Act ☐ 751 Family and Medical Leave Act ☐ 790 Other Labor Litigation ☐ 791 Empl. Ret. Inc. Security Act IMMIGRATION ☐ 462 Naturalization Application ☐ 463 Habeas Corpus - Alien Detainee ☐ 465 Other Immigration Actions	☐ 422 Appeal 28 USC 158 ☐ 423 Withdrawal 28 USC 157 PROPERTY RIGHTS ☐ 820 Copyrights ☐ 830 Patent ☐ 840 Trademark SOCIAL SECURITY ☐ 861 HIA (1395ff) ☐ 862 Black Lung (923) ☐ 863 DIWC/DIWW (405(g)) ☐ 864 SSID Title XVI ☐ 865 RSI (405(g)) FEDERAL TAX SUITS ☐ 870 Taxes (U.S. Plaintiff or Defendant) ☐ 871 IRS—Third Party 26 USC 7609	☐ 400 State Reapportionment ☐ 410 Antitrust ☐ 430 Banks and Banking ☐ 450 Commerce ☐ 460 Deportation ☐ 470 Racketeer Influenced and Corrupt Organizations ☐ 480 Consumer Credit ☐ 490 Cable/Sat TV ☐ 850 Securities/Commodities/Exchange ☐ 890 Other Statutory Actions ☐ 891 Agricultural Acts ☐ 893 Environmental Matters ☐ 895 Freedom of Information Act ☐ 896 Arbitration ☐ 899 Administrative Procedure Act/Review or Appeal of Agency Decision ☐ 950 Constitutionality of State Statutes
REAL PROPERTY ☐ 210 Land Condemnation ☐ 220 Foreclosure ☐ 230 Rent Lease & Ejectment ☐ 240 Torts to Land ☐ 245 Tort Product Liability ☐ 290 All Other Real Property	CIVIL RIGHTS ☐ 440 Other Civil Rights ☐ 441 Voting ☐ 442 Employment ☐ 443 Housing/ Accommodations ☐ 445 Amer. w/Disabilities - Employment ☐ 446 Amer. w/Disabilities - Other ☒ 448 Education	PRISONER PETITIONS ☐ 463 Alien Detainee ☐ 510 Motions to Vacate Sentence ☐ 530 General ☐ 535 Death Penalty ☐ 540 Mandamus & Other ☐ 550 Civil Rights ☐ 555 Prison Condition			

V. ORIGIN (Place an "X" in One Box Only)

☐ 1 Original Proceeding ☐ 2 Removed from State Court ☐ 3 Remanded from Appellate Court ☐ 4 Reinstated or Reopened ☐ 5 Transferred from another district (specify) ☐ 6 Multidistrict Litigation ☐ 7 Appeal to District Judge from Magistrate Judgment

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity):

Brief description of cause:

VII. REQUESTED IN COMPLAINT:

☐ CHECK IF THIS IS A CLASS ACTION UNDER F.R.C.P. 23

DEMAND $

CHECK YES only if demanded in complaint

JURY DEMAND ☐ Yes ☐ No

VIII. RELATED CASE(S) IF ANY

(See instructions)

JUDGE

DOCKET NUMBER

DATE

SIGNATURE OF ATTORNEY OF RECORD

FOR OFFICE USE ONLY

RECEIPT # AMOUNT APPLYING IFP JUDGE MAG. JUDGE

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO

I. Civil Categories. (Please check one category only.

1. [x] General Civil
2. [ ] Administrative Review/Social Security
3. [ ] Habeas Corpus Death Penalty

*If under Title 28, §2255, name the SENTENCING JUDGE: _____

CASE NUMBER _____

II. **RELATED OR REFILED CASES.** See LR 3.1 which provides in pertinent part: "If an action is filed or removed to this Court and assigned to a District Judge after which it is discontinued, dismissed or remanded to a State court, and subsequently refiled, it shall be assigned to the same Judge who received the initial case assignment without regard to the place of holding court in which the case was refiled. Counsel or a party without counsel shall be responsible for bringing such cases to the attention of the Court by responding to the questions included on the Civil Cover Sheet."

This action is [ ] RELATED to another PENDING civil case. This action is [ ] REFILED pursuant to LR 3.1.

If applicable, please indicate on page 1 in section VIII, the name of the Judge and case number.

III. In accordance with Local Civil Rule 3.8, actions involving counties in the Eastern Division shall be filed at any of the divisional offices therein. Actions involving counties in the Western Division shall be filed at the Toledo office. For the purpose of determining the proper division, and for statistical reasons, the following information is requested:

ANSWER ONE PARAGRAPH ONLY. ANSWER PARAGRAPHS 1 THRU 3 IN ORDER. UPON FINDING WHICH PARAGRAPH APPLIES TO YOUR CASE, ANSWER IT AND STOP.

(1) **Resident defendant.** If the defendant resides in a county within this District, please set forth the name of such county.

COUNTY:

Definition: For the purpose of answering the above, a corporation is deemed to be a resident of that county in which it has its principal place of business in that district.

(2) **Non-Resident defendant.** If no defendant is a resident of a county in this district, please set forth the county wherein the cause of action arose or the event complained of occurred.

COUNTY:

(3) **Other Cases.** If no defendant is a resident of this district, or if the defendant is a corporation not having a principle place of business within the district, and the cause of action arose or the event complained of occurred outside this district, please set forth the county of the plaintiff's residence.

COUNTY:

The Counties in the Northern District of Ohio are divided into divisions as shown below. After the county is determined in Section III, please check the appropriate division.

EASTERN DIVISION

- [ ] AKRON (Counties: Carroll, Holmes, Portage, Stark, Summit, Tuscarawas and Wayne)
- [ ] CLEVELAND (Counties: Ashland, Ashtabula, Crawford, Cuyahoga, Geauga, Lake, Lorain, Medina and Richland)
- [x] YOUNGSTOWN (Counties: Columbiana, Mahoning and Trumbull)

WESTERN DIVISION

- [ ] TOLEDO (Counties: Allen, Auglaize, Defiance, Erie, Fulton, Hancock, Hardin, Henry, Huron, Lucas, Marion, Mercer, Ottawa, Paulding, Putnam, Sandusky, Seneca, VanWert, Williams, Wood and Wyandot)

UNITED STATES COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

No. 4:10CV0307

WALTER J. HIMMELREICH, PLAINTIFF

v.

UNITED STATES OF AMERICA

Oct. 13, 2010

Motion to Dismiss

Pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure, Defendant United States of America hereby moves this Court for an order dismissing this case with prejudice. This Court lacks subject matter jurisdiction over Plaintiff's claims in this case, because Plaintiff's claims fall within the discretionary function exception to the Federal Tort Claims Act. The reasons for this Motion are fully set forth in the attached memorandum in support, which is incorporated herein by reference.

Respectfully submitted

STEVEN M. DETTELBACH
United States Attorney

By: /s/ LISA HAMMOND JOHNSON
LISA HAMMOND JOHNSON (0061681)
Assistant U.S. Attorney
Carl B. Stokes United States Court House
801 West Superior Avenue, Suite 400
Cleveland, Ohio 4113-1852
(216) 622-3679
(316) 522-4982 facsimile
E-mail: lisa.hammond.johnson@usdoj.gov

CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of October, 2010, a copy of the foregoing ***Motion to Dismiss*** and ***Memorandum in Support*** were filed electronically. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system. A copy was also mailed by regular United States mail, postage prepaid, to:

Walter J. Himmelreich, Pro se
#13152-067
Elkton Federal Correctional Inst.
P.O. Box 10
Lisbon, OH 44432

/s/ LISA HAMMOND JOHNSON
LISA HAMMOND JOHNSON
Assistant U.S. Attorney

UNITED STATES COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. 4:10CV307

WALTER J. HIMMELREICH, PLAINTIFF

v.

UNITED STATES OF AMERICA

MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

INTRODUCTION

Defendant United States of America has moved this Court for an order dismissing this case with prejudice pursuant to Rule 12(b)(1) of the Federal Rules of civil Procedure. This Court lacks subject matter jurisdiction over Plaintiff's claims in this case because Plaintiff's claims fall within the discretionary function exception to the Federal Tort Claims Act ("FTCA"), 28 U.S.C. § 2671, *et seq.*

BACKGROUND

Plaintiff Walter J. Himmelreich is a federal inmate currently incarcerated at the Federal Correctional Institution in Elkton, Ohio ("FCI Elkton"). Plaintiff is incarcerated due to his conviction for production of child pornography. (Declaration of Jason Streeval ("Streeval Dec."), ¶ 4.) On October 20, 2008, Plaintiff was assaulted in a stairwell by inmate Peter Macari. (Streeval Dec., ¶ 5.) Plaintiff claims that Macari punched him and kicked him when he was on the

ground. (R. 1-1 Claim For Damage, Injury or Death.) Plaintiff suffered bruising and abrasions on his head, a laceration on his eye and a swollen lip. (R. 1-1 Basis of Claim.) Plaintiff received minor first aid from medical staff. (Streeval Dec., ¶ 5.)

On October 20, 2008, Inmate Macari had been returned to the general population at FCI Elkton after being placed in the Speical Housing Unit for disciplinary infractions. (Streeval Dec., ¶ 5.) Before Macari returned to the general population, he told the Unit Discipline Committee that "I have had a lot of stress here, am not able to live with pedophiles. Also, I am not able to take the right programs here, everything seems to be going against me. If I go back out on the compound, I will smash a pedophile." (Streeval Dec. ¶ 5.)

Plaintiff attached to his complaint a copy of a completed Standard Form 95, Claim for Damage, Injury, or Death, dated February 8, 2009. (R. 1-1). Plaintiff also attached a copy of a memorandum from BOP's regional counsel denying Plaintiff's administrative tort claim, dated August 10, 2009. (R. 1-1.)

In his administrative tort claim, Plaintiff claims that he was "intentionally assaulted by inmate Peter Macari after he told staff member[s] that it was his intention. He told the security staff that he had told the Unit Team of his intention (within the hearing of the claimant) immediately after the incident while being interviewed within the Lieutenant's Official Lobby area." (R. 1-1 at 3.) Plaintiff does not claim that Macari had threatened him before the assault occurred. Plaintiff also does not claim that he told staff about any threats against him before the assault occurred.

Plaintiff also attached a handwritten description of his claim, entitled "Basis of Claim." In that document, Plaintiff states that on October 20, 2008, Plaintiff "was battered and severely beaten in the skull and upper body by inmate Peter Macari." Plaintiff stated that he "suffered external injuries from the beating with at least one permanent scar as a daily reminder of the attack." (R. 1-1 Basis of Claim.)

On February 11, 2010, Plaintiff initiated the instant case by filing an "Appeal of Denial of Administrative Tort Claim TRT-NER-2009-02319 Under 28 USC § 2672." (R. 1 Compl.) In this document, Plaintiff stated that he "[a]ppeals the Denial of the Administrative Tort Claim (attached)" and "claims that the answers that the Regional Counsel for the Northeast Region of the Federal Bureau of Prisons are in dispute as to their accuracy and validity." (R. 1 at 1.)

LAW AND ARGUMENT

I. THE FEDERAL TORT CLAIMS ACT AND THE DISCRETIONARY FUNCTION EXCEPTION.

The United States, as sovereign, is immune from suit except as it specifically consents to be sued, and the terms of its consent must be strictly construed. *United States v. Testan*, 424 U.S. 392, 399 (1976). The Federal Tort Claims Act ("FTCA"), 28 U.S.C. §§ 2671-80, is a limited waiver of the government's sovereign immunity. Pursuant to the FTCA, Congress has waived the United States's immunity from suits:

> for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or

> omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. § 1346(b)(1). The FTCA provides the exclusive remedy for injury or loss of property arising or resulting from the negligent or wrongful act of a government employee. 28 U.S.C. § 2679(b)(1).

However, the waiver of sovereign immunity provided by the FTCA is subject to several exceptoins. The FTCA waiver does not apply to "any claim . . . based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused." 28 U.S.C. § 2680(a); *Reetz v. United States*, 224 F.3d 794 (6th Cir. 2000). Because Congress has not waived the sovereign immunity of the United States for claims that fall within the discretionary function exception, federal courts lack subject matter jurisdiction over such claims. *Sharp ex rel. Estate of Sharp v. United States*, 401 F.3d 440, 443 (6th Cir. 2005) ("If the discretionary-function exception applies and Congress has not otherwise waived the United States's immunity, then we lack subject matter jurisdiction over the action.")

The discretionary function exception serves to protect from suit, those "discretionary acts and functions of government" involving policy judgments and decisions. *Rich v. United States*, 119 F.3d 447, 450 (6th Cir. 1997). Conduct covered by the discretionary

function exception is not limited to the policy or planning levels of the Government, but extends to those day-to-day decisions made at an operational level. *See United States v. Gaubert*, 499 U.S. 315, 325 (1991).

In determining whether the discretionary function exception applied to a particular case, courts employ a two-part test articulated by the Supreme Court in *United States v. Gaubert*, 499 U.S. 315, 322 (1991). First, a court must determine whether the employee's decision at issue involved an element of judgment or choice. *Gaubert*, 499 U.S. at 315. "If the answer to that question is 'yes,' then the court must ask 'whether that judgment is the kind that the discretionary function exception was designed to shield.'" *Montez v. United States*, 359 F.3d 392, 395 (6th Cir. 2004) (quoting *Gaubert*, 499 U.S. at 322-23).

"[T]he discretionary function exception will not apply when a federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow." *Berkovitz v. United States*, 486 U.S. 531, 536 (1988). If the government official's choices in the matter involved a matter of discretion, the Supreme Court has held that courts must presume that the government official's decisions are grounded in policy, and thus fall within the discretionary function exception, unless the plaintiff can "allege facts which would support at finding that the challenged actions are not the kind of conduct that can be said to be grounded in the policy of the regulatory regime." *Gaubert*, 499 U.S. at 324-35.

II. THE GOVERNING STATUTE AND REGULATIONS ALLOW BOP OFFICALS TO EXERCISE JUDGMENT AND DISCRETION REGARDING PLAINTIFF'S SAFETY.

The BOP staff exercised their discretion and judgment with regard to Plaintiff's safety when they released Inmate Macari from SHU and returned him to general population at FCI Elkton. (Streeval Dec., ¶¶ 3, 6.) In this case, Plaintiff does not specify any statutes that Defendant allegedly violated. However, a statute and several regulations are applicable to the actions at issue in this case. 18 U.S.C. § 4042(a) provides that:

> The Bureau of Prisons, under the direction of the Attorney General, shall—
>
> (1) have charge of the management and the regulation of all Federal penal and correctional institutions;
>
> (2) provide suitable quarters and provide for the safekeeping, care and subsistence of all persons charged with or convicted of offenses against the United States, or held as witnesses or otherwise;
>
> (3) provide for the protection, instruction, and discipline of all persons charged with or convicted of offenses against the United States.

The Sixth Circuit has held that, although this statute "imposes and mandatory duty upon the Bureau of Prisons (BOP) through the use of the word 'shall'," that duty "is of a general nature." *Montez*, 359 F.3d at 396. The *Montez* court found that § 4042(a) gives BOP officials no specific guidance in determining how to accomplish the statute's objective of inmate safe-

keeping. Therefore, the court found that the statute provides BOP staff with discretion in determining how best to protect inmates. *Id.* *Accord Cohen v. United States*, 151 F.3d 1338, 1242 (11th Cir. 1998) (BOP's discretion in fulfilling duty to safeguard prisoners triggers the discretionary function exception); *Calderon v. United States*, 123 F.3d 947, 950 (7th Cir. 1997) (same).

BOP's regulations also impose duties upon the agency with regard to disciplinary actions and determining whether or not inmates should be housed in the general population. 28 C.F.R. § 541.10(b) states that:

> The following general principles shall apply in every disciplinary action taken:
>
> . . .
>
> (2) Staff shall take disciplinary action at such times and to the degree necessary to regulate an inmate's behavior within Bureau rules and institution guidelines and to promote a safe and orderly institution environment.

Another regulation that may apply in this case is 28 C.F.R. § 541.22(a), which states that a prison warden "may also place an inmate in administrative detention when the inmate's continued presence in the general population poses a serious threat to life, property, self, staff, other inmates or to the security or orderly running of the institution. . . . " Finally, 28 C.F.R. § 541.23(a) states that "Staff may consider the following categories of inmates as protection cases. . . . "

The Sixth Circuit has found that, with regard to all of these regulations, "their implementation is left to the discretion of BOP officials." *Montez*, 359 F.3d at

396-97. *Accord Dysktra v. U.S. Bureau of Prisons*, 140 F.3d 791, 796 (8th Cir. 1998) (use of word "may" in these regulations shows that they are discretionary). The language of the regulations, which use the words such as "may" rather than "shall," and "at such times" and "to the degree necessary," clearly give BOP officials discretion to determine how to accomplish the duties imposed by those regulations. *See Dorris v. Absher*, 179 F.3d 420, 429 (6th Cir. 1999) ("The use of the term 'may' in a statute is generally construed as permissive rather than mandatory.") Therefore, the relevant statute and regulations "allowed BOP officials to exercise judgment when making decisions regarding [an inmate's] safety." *Montez*, 359 F.3d at 397.

Because the governing statute and regulations permit BOP staff to exercise judgment and choice, they are presumed to implicate issues of policy under *Gaubert*. Thus, Defendant's actions taken in conformance with those statutes are presumed to fall within the discretionary function exception to the FTCA.

III. PLAINTIFF CANNOT OVERCOME THE PRESUMPTION THAT BOP STAFF'S DECISIONS IN THIS CASE ARE GROUNDED IN POLICY AND ARE OF THE TYPE THAT THE DISCRETIONARY FUNCTION EXCEPTION WAS DESIGNED TO PROTECT.

Staff decisions in this case, particularly the decision to place Inmate Macari in general population, involve consideration of public policy. Courts have found that decisions of corrections officials as to the placement of inmates and the general security provided in a correctional facility implicate public policy, particularly when

prison staff are required to balance various risks and prioritize their limited resources. *Alfrey v. United States*, 276 F.3d 557, 565 (9th Cir. 2002) (BOP's decision not to relocate inmate in response to threats involves balancing risks and "implicate[s] social and public policy considerations.") As the First Circuit aptly states, "The management of large numbers of potentially dangerous individuals within a penal facility inevitably requires not only the exercise of discretion but decisionmaking within the context of various difficult policy choices." *Santana-Rosa v. United States*, 335 F.3d 39, 44 (1st Cir. 2003).

Moreover, the Supreme Court often has noted that broad deference is afforded to the discretion exercised by prison administrators in adopting and executing policies and practices that address the day-to-day problems in operating a correctional institution. *See, e.g.*, *Thornburgh v. Abbott*, 490 U.S. 401, 407-08 (1989); *Turner v. Safley*, 482 U.S. 78, 89-90 (1987); *Whitley v. Albers*, 475 U.S. 312, 321-22 (1986); *Bell v. Wolfish*, 441 U.S. 520, 547 (1979); *Pell v. Procunier*, 417 U.S. 817, 826-27 (1974). Such decisions necessarily involve balancing limited prison resources with the overriding concern for institutional security. *Turner*, 482 U.S. at 89-90.

Because of the policy issues that inform decisions about inmate safety, courts have consistently held that the discretionary function exception bars suits by federal prisoners for assaults by other inmates. *See, e.g.*, *Montez*, 359 F.3d at 399 (discretionary function exception applied to bar negligence claim by estate of prisoner murdered by another inmate); *Santana-Rosa*, 335 F.3d at 44 (failure to protect inmate from assault

by another inmate barred by discretionary function exception); *Dykstra v. U.S. Bureau of Prisons*, 140 F.3d 791, 796 (8th Cir. 1998) (discretionary function exception barred claim that prison officials failed to warn plaintiff that his youthful appearance might make him vulnerable to attacks and failed to place him in protective custody); *Cohen v. United States*, 151 F.3d 1338, 1342-43 (11th Cir. 1998 (discretionary function exception barred claim that prison officials failed to protect inmate from assault by another inmate); *Calderon*, 123 F.3d at 950 (7th Cir. 1997) (discretionary function exception barred claim that prison officials failed to prevent inmate's cell mate from attacking him); *Buchanan v. United States*, 915 F.2d 969, 972 (5th Cir. 1990) (discretionary function exception barred inmate's claim for damages sustained while held hostage by other inmates).

The Sixth Circuit has held that "[a]s a general principle, a complaint that alleges the existence of a specific and immediate threat against an inmate is more likely to survive a motion to dismiss than a complaint that either alleges a nonspecific threat or provides only conclusory statements regarding the existence of a threat." *Montez*, 359 F.3d at 398. In this case, inmate Macari allegedly said that he was going to "smash a pedophile." (Streeval Dec., ¶ 5.) Such a threat is not specific to Plaintiff, especially when between 15 percent and 20 percent of the inmates at FCI Elkton have been convicted of sexual crimes against children. (Streeval Dec., ¶ 6.) Plaintiff did not allege that he had informed staff members of any specific threat made against him before the assault occurred, and there is no record of Plaintiff requesting staff protection before the assault occurred on Oct 20,

2008. (Streeval Dec., ¶ 4.) Thus, Plaintiff's claim fails to provide specific factual allegations necessary to rebut the presumption that Defendant's decisions involved considerations of public policy.

Because the decisions at issue in this case, including the placement of Macari in general population, involve considerations of public policy, they are "of the kind that the discretionary function exception was designed to shield." *Gaubert*, 499 U.S. at 322-23. Therefore, the discretionary function execption applies and deprives this Court of subject matter jurisdiction over Plaintiff's claims.

CONCLUSION

For all of the foregoing reasons, the discretionary function exception applies to Plaintiff's claims, and this Court lacks subject matter jurisdiction over them. Therefore, this Court should dismiss this case with prejudice, with costs to Plaintiff.

Respectfully submitted

STEVEN M. DETTELBACH
United States Attorney

By: /s/ LISA HAMMOND JOHNSON
LISA HAMMOND JOHNSON (0061681)
Assistant U.S. Attorney
Carl B. Stokes United States Court House
801 West Superior Avenue, Suite 400
Cleveland, Ohio 4113-1852
(216) 622-3679
(316) 522-4982 facsimile
E-mail: lisa.hammond.johnson@usdoj.gov

CERTIFICATE OF COMPLICANCE WITH LOCAL RULE 7.1(f)

Pursuant to 28 U.S.C. § 1746, undersigned counsel certifies that the forgoing Memorandum in Support of Defendant's Motion to Dismiss is twelve (12) pages in length and within the page limitations of a matter assigned to the standard track.

/s/ LISA HAMMOND JOHNSON
LISA HAMMOND JOHNSON
Assistant U.S. Attorney

UNITED STATES COURT
FOR THE NORTHERN DISTRICT OF OHIO

Civil Action No.10CV0307

WALTER J. HIMMELREICH, PLAINTIFF

v.

UNITED STATES OF AMERICA

DECLARATION OF JASON STREEVAL

I, Jason Streeval, do hereby declare, certify and state as follows:

1. I am currently employed as a Unit Manager by the United States Department of Justice, Federal Bureau of Prisons, Federal Correctional Institution (FCI), Elkton, Ohio. I have held this position since October 2007. As Unit Manager at FCI Elkton, I am responsible for, among other things, addressing issues and problems of inmate administration and security which may arise at FCI Elkton. In response to these issues and/or problems, I determine the appropriate course of action to implement. Together with Executive Staff and/or various department heads at FCI Elkton, I review and evaluate security concerns identified and balance competing interests to support the overriding concern for institution security.

2. At FCI Elkton, I serve as the Unit Manager for two housing units and am responsible for supervising a Unit Team of case managers, counselors and the inmates assigned to the housing units. I am familiar with inmate Walter Himmelreich Register No.

13152-067. FCI Elkton maintains an inmate central file for each inmate which contains a variety of information on the inmate to include Presentence Report, Judgment and Commitment Order, disciplinary reports, progress reports and threat assessments (if they exist). A threat assessment is an investigation and evaluation of whether an inmate or staff member is facing a threat from another inmate or group of inmates. A threat assessment is usually initiated by a member of the Unit Team after receiving information from another inmate, staff member or outside source that the safety of another individual is at risk. Maintaining the safety and security of the institution and of inmates and staff who reside and work at the institution is the primary goal of FCI Elkton and each Bureau of Prisons' institution.

3. There are no Bureau of Prisons rules or regulations that dictate the use of threat assessments on inmates who are refusing to return to the compound or general population. Such decisions are made independently by the Unit Team, Captain, or Special Housing Unit (SHU) Lieutenant of each institution, depending on who is supervising the inmate.

4. I have reviewed Plaintiff's central file and did not find any threat assessments conducted prior to October 20, 2008. Plaintiff's instant conviction is for Production of Child Pornography and he has been housed at FCI Elkton since January 23, 2007. Plaintiff had not sought protection from staff prior to the assault on October 20, 2008. In March 2009, there was a threat assessment conducted for Plaintiff that discusses the inmate Assailant, but that was done in March 2009 after Plaintiff complained to staff that

inmates were taking about him. A threat assessment was conducted but because Plaintiff did not name or identify the inmates who were talking about him and because Plaintiff desired to continue to remain in general population, no further action was taken at that time. The Assailant inmate was still housed in the Special Housing Unit (SHU) at FCI Elkton but was pending transfer to another institution. The Assailant is classified as a Separatee of Plaintiff meaning that they will not be housed in the same institution again as long as the Separatee Order exists.

5. Inmates housed in the SHU are being housed there for either administrative detention or disciplinary segregation purposes. On October 14, 2008, the Assailant was housed in Elkton's Special Housing Unit (SHU) in administrative detention when he received a disciplinary incident report for refusing a program assignment. The Assailant refused a direct order to return to the general population at Elkton. On October 16, 2008 the Assailant met with his Unit Discipline Committee regarding the incident report and told them "I have had a lot of stress here, am not able to live with pedophiles. Also, I am not able to take the right programs here, everything seems to be going against me. If I go back out on the compound, I will smash a pedophile." On October 20, 2008, the Assailant was released from SHU and returned to Elkton's general population. That afternoon Plaintiff was returning to his housing unit when the Assailant approached him in the unit stairwell, punched him in the face and then kicked him numerous times when Plaintiff fell to the ground. Once the scene was secured, both inmates were medically assessed by health ser-

vices staff and interviewed by Lieutenants. Plaintiff also received minor first aid from health services staff.

6. In my correctional experience, it is common for inmates to make statements similar to what the Assailant said about pedophiles; talking about violence against pedophiles is a posturing that many inmates take. Within the prison population inmates who have convictions for crimes against children and/or are considered pedophiles, are generally viewed as having the least status among other inmates. Staff weighed what he said but without a more specific threat against a particular inmate or a more specific physical description or situational threat, staff judged he was cleared to go back to general population. Within the last few years, Elkton's population has absorbed an increased number of inmates with convictions for sexual crimes against children. From 2008 to present I would estimate that at least 15-20% of inmates housed at Elkton have a conviction for sexual crimes against children. A statement or threat that an inmate intended to harm a pedophile, without more specific identifying information, usually does not always allow staff to gauge the actual intent or seriousness of an inmate making such a statement. Staff rely on their experience and judgment to gauge the nature and severity of a threat, how likely the inmate is to act on a threat or whether the inmate is making such statements for self-serving reasons. For example, some inmates attempt to manipulate the system to effectuate a transfer to another institution or avoid having to deal with other inmates. Every time we release an inmate from the SHU or transition in newly arrived inmates to the general population, staff assess how the inmate is likely to behave among the other inmates,

however there is always a risk that violence or another institution disruption could occur. In sum, there is no specific regulation or law that was violated by staff using their judgment in this case.

I declare the foregoing is true and correct to the best of my knowledge and belief, and is given under penalty of perjury pursuant to 28 U.S.C. § 1746.

Executed this 13th Day of Oct. 2010

/s/ JASON STREEVAL
JASON STREEVAL
Unit Manager
Federal Correctional Institution
Elkton Ohio

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. 4:10-cv-00307-JRA

WALTER J. HIMMELREICH, PLAINTIFF

v.

UNITED STATES OF AMERICA, DEFENDANT

Nov. 8, 2010

Plaintiff's Answer to Defendant's Motion to Dismiss

Now comes the Plaintiff, Walter J. Himmelreich, Pro Se, in Answer to the Defendant's Motion to Dismiss the above captioned action under Federal Rule of Civil Procedure 12(b)(1) for Lack of Subject Matter Jurisdiction and states that the Plaintiff's claim falls into the Exception (to the Exception (which the Defendant's are claiming causes the Lack of Subject Matter Jurisdiction of the Court)), which the courts have carved out of the Government's Discretionary Function Exception to the Federal Tort Claims Act and avers the following facts and case law for the Court's consideration; and asks this Honorable Court to Dismiss the Defendant's Motion to Dismiss the above captioned action as the Court has jurisdiction:

1) That during the conference call hearing conducted by the Court's Law Clerk in the absence of Judge Adams on September 18, 2010, the Defendant, by and

through their counsel, AUSA Johnson, admitted that the Government does not deny that the Plaintiff was assaulted and battered by another inmate [one Peter B. Macari], but the Government did not know ahead of time that the other inmate was going to do what the Plaintiff alleged that the other inmate said he was going to do.

2) That the Government's Motion to Dismiss includes a Declaration which states that the Government knew before the fact that an assault/battery was going to take place provided that the Government performed certain actions, which they did.

3) That the United States of America admits that the Plaintiff is lawfully under their care and protection under 18 USC § 4042(a)(3).

4) That the United States of America admits that the Plaintiff was Assaulted/Battered by Inmate Peter B Macari on October 20, 2008, in the stairwell leading to the Plaintiff's housing unit as the Plaintiff was returning to his housing unit.

5) That the United States has consented to this suit in equity and that fact is not in dispute.

6) That this suit was filed under the Federal Tort Claims Act (hereinafter FTCA), 28 USC §§ 2671, et seq.

7) That in the case of United States vs Muniz, 374 US 150, 10 LEd2d 805 (1963), the United States Supreme Court held that the FTCA did not prohibit suits against the Federal Government by federal prisoners for injuries which were allegedly received in prison and that Congress specifically (and purposely) failed to

exclude federal prisoners from exclusion provisions of the FTCA.

8) That the clear language of 18 USC § 4042(a)(3) states that:

> "The Bureau of Prisons, under the direction of the Attorney General, **shall**—
>
> (3) provide for the **protection**, instruction, and discipline **of all persons** charged with or convicted of offenses against the United States."

9) That the Supreme Court in the case of Alabama vs Bozeman, 533 US 146, 153, 150 LEd2d 188 (2001), Justice Breyer, in quoting the cases of Anderson vs Yungkau, 329 US 482, 485, 91 LEd 436 (1947), which quoted Escoe vs Zerbst, 295 US 490, 493, 79 LEd 1566 (1935), stated "The word 'shall' is ordinarily 'the language of command'".

10) That according to the Defendant's Memorandum in Support, the Sixth Circuit Court of Appeals in Montez, 359 F3d at 396, has reduced the Supreme Court's determination from the language of command to that "of a general nature".

11) That the Defendant's admit that in one section of the Code of Federal Regulations (541.10(b)) the Government has used the word shall to describe what it is supposed to do; but, in the two sections which they quote as being directly applicable to the Congressional directive of 18 USC § 4042(a)(3), the Department of Justice has lessoned of those sections (541.22(a) and 541.23(a)) by substituting the word may for the word shall, thus violating the intent of Congress and even in violation of the Administrative Procedures Act under 5 USC §§ 700, et seq.

12) That the Supreme Court in Muniz, supra, determined that the federal inmates held in correctional facilities have the right to sue the United States of America for personal injuries they sustain as a result of a government employee's negligence.

13) That a federal inmate's personal property includes his physical body plus what few possessions the federal bureau of prisons allows the inmate to have as creature comforts.

14) That the Supreme Court in Hatahley vs United States, 351 US 173, 100 LEd 1065 (1956), that 28 USC § 2680(a) could not apply since the government agents had not exercised due care in their enforcement of the federal law and had proceeded with "complete disregard" for the property rights of the families; thus negating the discretionary function exception.

15) That in 1974, Congress amended 28 USC § 2680(h) to include a provision that with regard to acts or omissions of investigative or law enforcement officers of the United States Government, the FTCA provisions shall apply in assault and battery cases.

16) That in the case of Cohen vs United States, 252 F Supp 679, (ND GA, 1966), the Warden of USP Atlanta described Administrative Segregation as being for "disciplinary purposes, for our protection, and for the protection of others".

17) That the Defendant admits that when the Assailant made the statement of his intentions, he was in the Administrative Segregation area of the Special Housing Unit of FCI-Elkton.

18) That the Defendant was under a contractual obligation to the Plaintiff to protect him as the rules

which the inmate is supposed to follow does not provide for self-protection and therefore the Defendant has breached its direct and implied duties to protect in the same manner as the Government had a duty to safeguard and protect the children in its care in the United States Military Academy's daycare center in the case of Doe vs Scott, 652 F Supp 549, (SD NY, 1987), long before the Plaintiff becamse a federal prisoner.

19) That the Psychology Staff of the Federal Correctional Institution - Elkton did not follow its own Program Statement 5310.12, Psychological Services Manual, Part 2.3, Duty to Warn.

20) That the Duty to Warn part of the Program Statement reads:

> "General guidelines setting forth the conditions necessary for a therapist's duty to warn were established based upon the landmark decision in Tarasoff vs Regents of the University of California (1968). The duty, as defined by the court in the Tarasoff case, arises when a therapist determines that a client presents a serious danger of violence to another. When such a determination is made, the therapist is obligated to use reasonable care to protect the intended victim against such danger. Subsequent court decisions in other states have rendered slightly different opinions on the psychologist's duty to warn."

21) That the Duty to Warn Program Statement also says:

> "Title 18 USC §§ 4243 and 4246 specify that mental health professionals have a duty to rec-

ommend hospitalization, through the federal court system, when an individual, because of mental illness, presents a substantial risk of bodily harm to another person or serious damage to the property of another. The Bureau's Health Services Manual defines "substantial risk" as a belief by treatment staff that the inmate will, if released, commit a violent act within six months."

22) That the Psychological Services Manual Program Statement also says:

"The APA's [American Psychology Association's] Ethical Principles of Psychologists and Code of Conduct also permits the communication of information obtained in a therapy setting when there is clear and imminent danger to an individual or to society."

23) That the Psychology Department of FCI-Elkton, and in particular the staff psychologist(s) who saw the assailant while he was in the Special Housing Unit's (SHU) Administrative Detention section when he made his ominous statements regarding his plans to perform an assault on another inmate in the general population area of the FCI-Elkton compound; in recommending that the assailant be permitted to return to the general population was(were) guilty of reckless disregard for safety.

24) That the FCI-Elkton Law Library Law Dictionary defines reckless disregard for safety as:

"an actor's (q.v.) conduct, if he does an act or intentionally fails to do an act which it is his duty to the other to do, knowing or having reason to know of facts which would lead a reasonable man (q.v.) to re-

alize, not only that his conduct creates an unreasonable risk of physical harm to another, but also that such risk is substantially greater than that which is necessary to make his conduct negligent. Sometimes called wanton or willful misconduct. Restatement (Second) of Torts § 500."

25) That the Law Dictionary defines reasonable care or ordinary care as an "imprecise term for the conduct of a reasonably prudent person under similar circumstances.

26) That the Law Dictionary defines negligent conduct as:

"either—

(1) An act which the actor (q.v.) as a reasonable man (q.v.) should recognize as involving an unreasonable risk causing an invasion of an interest of another, or

(2) a failure to do an act which is necessary for the protection or assistance of another and which the actor is under a duty to do. Restatement (Second) of Torts § 284."

27) That the Warden and Staff of FCI-Elkton were negligent in their conduct when they decided to allow a man whose criminal background included serving time for Attempted First Degree Murder for beating a man over the head with a baseball bat back out onto the General Population Compound of over 1800 inmates, which included approximately fifteen to twenty percent as being potential targets for the inmate that was released from the SHU.

28) That, after the fact, the Plaintiff recommended more security cameras be placed in strategic locations such as stairwells to attempt to prevent future occurrences of this nature and was rebuked by the Captain of Security who told the Plaintiff that she would not be told by an inmate how to run her operation; goes to show that there were inadequate safeguards prior to the assault/battery of the Plaintiff by the assailant and that the Security Department did not care about that issue.

29) That the Warden and the Executive staff did not deem the fact that the housing units are specifically designed for two correctional officers, one for each side of the unit, to be posted in the units for security purposes, and that only one correctional officer is currently posted in each unit to be a security factor (risk) when there are over 300 inmates located in each housing unit.

30) That the Supreme Court said in the case of Sheridan vs United States, 487 US 392, 101 LEd2d 352 (1988): "the negligence of other government employees who had allowed a foreseeable assault or battery to occur might have furnished a basis for liability that was entirely independent of the serviceman's employment status.".

31) That the Government has stated that the FTCA applies "under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred."

32) That each housing unit correctional officer has a set of post orders that they must follow regarding their work responsibilities.

33) That at the time of the Assault/Battery upon the Plaintiff, the regularly assigned correctional officer, Ms. Bourne(Sp?) was not there and Correctional Officer Simmons was her shift replacement for the day.

34) That neither Correctional Officer Simmons nor any of the B-Unit staff were in B-Unit or in the stairwell at the time of the Assault/Battery of the Plaintiff.

35) That there are no cameras or other visual security measures located in the stairwells unless a member of the correctional staff stands in the stairwell area during "open movement" periods.

36) That Correctional Officer Simmons was outside of the A/B Housing Unit smoking a cigarette during the time of the recall of the inmates to their housing units in preparation for the daily 4PM standing count, during which time the Assault/Battery occurred on the B-Unit landing in the stairwell.

37) That in the case of Garza vs United States of America, 161 Fed. Appx. 341, 346 (5th Cir., 2005), the Fifth Circuit Court of Appeals found that the failure of the guard to follow their Specific Post Orders which prescribes a specific set course of action for the post guard (in that case at the Federal Correctional Institution—Three Rivers, Texas) does not bar a cause of action under the discretionary function exception and is therefore in fact an Exception to the Discretionary Function Exception; which gives the Court jurisdiction to hear this case and permits it to go forward.

38) That the Declaration which is attached to the Defendant's Motion to Dismiss is newly discovered evidence which was not available to the Plaintiff at the time of his filing with the Federal Bureau of Prisons. That along with the fact that the Plaintiff was placed in Administrative Segregation from March 5, 2009 until May 4, 2009, because he filed this Tort Claim are the reasons that the Plaintiff is now asking the Court under the provisions of 28 USC § 2675(b) to add the amount of three million dollars ($3,000,000.00) to the amount of the original claim as treble damages for harassment, withholding evidence, psychological stress, and pecuniary damages.

39) That Program Statement ELK 1640.04F is the smoking regulations.

WHEREFORE, the Plaintiff, Walter J. Himmelreich, Pro Se, hereby requests that this Honorable Court Order that the Defendant's Motion to Dismiss under Federal Rule of Civil Procedure 12(b)(1) for Lack of Subject Matter Jurisdiction be Ordered to be Dismissed because the action before the Court falls into that which has been determined by the courts to be an exception to the Discretionary Function Exception of 28 USC § 2680(a) because the correctional officer on duty at the time was not following his specific post's order and was outside of the housing unit area smoking a cigarette at the time that the Plaintiff was being assaulted/battered by another inmate on the stairwell landing of the housing unit, and that other proximal causes of negligence by the facility staff before the incident contributed to the reckless disregard for safety and negligent conduct which allowed the incident to happen.

Dated: Nov. 8, 2010

Respectfully submitted,

/s/ WALTER J. HIMMELREICH
WALTER J. HIMMELREICH
Federal Register # 13152-067
Federal Correctional Institution - Elkton
P.O. Box 10 Unit BA
Lisbon, OH 44432

Certification

I, Walter J. Himmelreich, Pro Se Plaintiff in the above captioned action before the Court hereby swear under the Penalty of Perjury, 28 USC § 1746, that the above is true and correct. I furthermore swear that I will be placing the same in the FCI-Elkton Prison Legal Mail on or before November 12, 2010, as a timely filing and will include a copy for AUSA Johnson and a return copy for myself along with postage prepaid envelopes, using the Prison Mailbox Filing Rule.
Dated: Nov. 8, 2010

Respectfully,

/s/ WALTER J. HIMMELREICH
WALTER J. HIMMELREICH, PRO SE.

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. 4:10-cv-00307-JRA

WALTER J. HIMMELREICH, PLAINTIFF

v.

UNITED STATES OF AMERICA, DEFENDANT

Nov. 28, 2010

Motion to Alter or Amend Judgment in the Above Captioned Case Under Federal Rule of Civil Procedure 59(e) and to Reconsider the Order of Dismissal Considering the Fact That the Correctional Officer Not Following His Post Orders Fails the Second Prong of the Gaubert Test Thereby Disallowing the Dismissal Under the Discretionary Function Exception and Giving the Court Subject Matter Jurisdiction Over This Action

---

Now comes the Plaintiff, Walter J. Himmelreich, Pro Se, to Request of this Honorable Court that it Alter or Amend the Judgment Causing the Dismissal of the above captioned case on November 18, 2010, since the Court failed to properly consider the facts of the case as presented in the Plaintiff's Response to the Defendant's Motion to Dismiss for Lack of Jurisdiction (especially the fact that the Posted Correctional Officer was not following his Post Orders when he abandoned his post of duty to smoke a cigarette at the time that he was supposed to be visible in his post area),

under Federal Rule of Civil Procedure 59(e); and that an Evidentiary Hearing should have been Ordered by the Court before it Prematurely Dismissed the above captioned action since the cause is actionable because the Government's Discretionary Function Exception does not apply in the case at hand; the same as was found by the United States Court of Appeals for the Fifth Circuit in the only other case of the same nature as the case before the Court being the Exception to the Discretionary Function Exception, thus making the United States liable, averring the following:

1) That the District Court's Memorandum aND Order was issued before the Defendant's Response to the Plaintiff's Answer to the Defendant's Motion to Dismiss was filed as was required by the Court in its scheduling Order, therefore denying the Plaintiff the opportunity to see what the Defendant's response would have been.

2) That the District Court's Memorandum and Order was written on November 18, 2010, was mailed out by the Clerk of the Court's Office on November 19, 2010, and was received by the Plaintiff in the FCI-Elkton General Mail Call on November 24, 2010 at 16:45 PM.

3) That the Plaintiff's Response to the Defendant's Motion to Dismiss and the related Biven's Action before the Court show that the Biven's Action is dealing with the issue of culpability on the part of the Defendant(s) for violating the Plaintiff's Civil Rights for releasing the assailant from the SHU after the assailant's threats were not taken seriously by the staff and the above captioned Federal Tort Claim is dealing with

the attack itself and the correctional officer's failure to follow post orders.

4) That the United States Supreme Court in Haines vs Kerner (citation omitted) instructed that a Pro Se Plaintiff's pleadings must be construed liberally and that the Pro Se Plaintiff is not supposed to be held to the same high standard as a professionally trained and licensed legal counsel.

5) That the Plaintiff's original filing with the Court only stated that there was a disagreement with the findings of the Federal Bureau of Prisons in their response to his Federal Tort Claim filing at the Agency level which the Court must adjudicate.

6) That the Plaintiff's Response to the Defendant's Motion to Dismiss for Lack of Jurisdiction addressed the fact that the failure of the correctional officer on duty at the B Unit post at the time of the assault and battery to follow the post orders (by essentially abandoning his post of duty by going outside of the unit and taking a smoke break during the recall of inmates to the housing units in preparation of taking the mandatory daily 4 PM stand-up count (which is one of the busiest moves on the compound of the day)) is a situation which is **not covered by the Discretionary Function Exception** of the Government which is written into the Federal Tort Claim Act, 28 USC §§ 2671, et seq..

7) That the Plaintiff's Response to the Defendant's Motoin to Dismiss cited the only other case law which involves the Federal Bureau of Prisons and an inmate being assaulted by (an)other inmate(s) when the correctional officer fails to follow their post orders and the assaulted (battered) inmate files a Federal Tort

Claim and the Government claims Lack of Jurisdiction because of the Discretionary Function Exception. See Garza vs United States, 2007 US District Lexis 17097 (USDC SDTX, 2007), applying the remand of Garza vs United States of America, 161 Fed Appx 341, 345-346 (5th Cir., 2005).

8) That the Court has glossed over and failed to mention in its Memorandum and Order that these facts were brought to the Court's attention by the Plaintiff in his Response to the Defendant's Motion to Dismiss, especially regarding the fact that the correctional officer was not following his post orders when he took the smoke break.

9) That the Court should have Ordered an Evidentiary Hearing to determine the validity and truth of the allegation that the post orders were not being followed by the correctional officer at the time of the assault and battery of the Plaintiff by the assailant.

10) That the Defendant(s) has videotape evidence which it has failed to release to the Plaintiff which conclusively shows that the allegation of the Plaintiff regarding the smoke break by the correctional officer who was supposed to be on duty at the post at the time of the assault and battery from the "Eye in the Sky" camera overlooking the compound yard.

11) That it is the Court's obligation to dispense justice fairly and properly under the law and to correct any errors in judgment that it makes or that is made by court personnel in that dispensation of justice.

12) That the Court noted in its Memorandum and Order's facts section regarding the Plaintiff's claim filing with the Court that:

"Himmelreich contends that the Government failed to protect him from an assault perpetrated by another inmate."

The Plaintiff does not dispute that finding of fact. The Plaintiff does dispute the fact that the Court did not look beyond the assumed argument that the Plaintiff complained that the Government released the assailant from the SHU after he made his threat and follow through to the fact that the correctional officer was at fault for not following his post orders.

13) That the correctional officer on duty in B Unit at the time of the assault and battery failed to protect the Plaintiff from the assault and battery when he abandoned his post.

14) That there were no other correctional staff located in B Unit during the time that the assault and battery of the Plaintiff occurred, even though the Bureau of Prisons has five other full time staff members permanently assigned to B Unit (2 counselors, 2 case managers, and a unit secretary) as well as a Unit Manager who is shared with the other unit located in the same housing building.

15) That the Memorandum and Order of the Court should be voided and an Evidentiary Hearing on the facts should be held regarding the issue of whether or not the correctional officer was following his post orders when he was outside of the unit he was posted to; when there were no other members of the staff on duty in the unit at the time; and when the change of shift was within the hour of the inmate move.

16) That if the Court refuses to grant the relief requested above, the the Plaintiff respectfully requests

that the Court construe this motion as a Notice of Appeal timely filed for the reasons as stated in this motion.

WHEREFORE, the Plaintiff, Walter J. Himmelreich, Pro Se, hereby requests that this Honorable Court under Federal Rule of Civil Procedure 59(e) Alter or Amend its Memorandum and Order of November 18, 2010, Dismissing the Plaintiff's Federal Tort Claim for Lack of Jurisdiction under Federal Rule of Civil Procedure 12(b)(1), in light of the facts which the Court failed to consider and which have been directly adjudicated by case law and Void that same said Memorandum and Order of Dismissal; Schedule an Evidentiary Hearing to verify the facts as presented to the Court; or, should the Court decline to do this request, to Reconstrue this Motion for Relief as a timely filed Notice of Appeal.

Dated: Nov. 28, 2010

Respectfully submitted,

/s/ WALTER J. HIMMELREICH
WALTER J. HIMMELREICH, PRO SE
Federal Register # 13152-067
Federal Correctional Institution - Elkton
P.O. Box 10 Unit BA
Lisbon, OH 44432

Certification

I, Walter J. Himmelreich, Pro Se, do hereby swear that the above statements are true and correct to the best of my knowledge and abilities under the Penalty of False Statements and Perjury, 28 USC § 1746. I furthermore solemnly swear that I will be placing the same along with the appropriate copies in the

FCI-Elkton Prison Legal Mail on November 29, 2010, in accordance with the mailbox filing rule of Houston vs Lack.

Dated: Nov. 28, 2010

Respectfully submitted,

/s/ WALTER J. HIMMELREICH

WALTER J. HIMMELREICH, PRO SE
Federal Register # 13152-067
Federal Correctional Institution - Elkton
P.O. Box 10 Unit BA
Lisbon, OH 44432

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. 4:10-cv-00307-JRA

WALTER J. HIMMELREICH, PLAINTIFF

v.

UNITED STATES OF AMERICA, DEFENDANT

Dec. 8, 2010

Notice of Appeal

Now comes the Plaintiff, Walter J. Himmelreich, Pro Se, to Appeal the District Court's Denial Without Opinion of the Plaintiff's Motion to Alter or Amend Judgment under Federal Rule of Civil Procedure 59(e) as the District Court had Subject Matter Jurisdiction over the above captioned case and the Discretionary Function of the Federal Tort Claims Act, 28 USC §§ 2671, et seq.; as stated in the prior brief of the Plaintiff and the Motion to Alter or Amend Judgment does not apply in this case. The Motion to Alter or Amend Judgment also clearly stated that should the District Court deny the Motion to Alter or Amend Judgment that it should also be considered as a Notice of Appeal, negating the need for this filing. The District Clerk filed the Denial of the Motion on November 30, 2010, and mailed it out on December 2, 2010, and the Plaintiff received his copy on December 7, 2010, at the FCI_Elkton General Population mail call at 4:25 PM.

When a correctional officer essentially abandons his post of duty, whether he be working in a local, state, federal, or privately run prison, allowing for the assault and battery of one inmate by another, then the cause is actionable and not exempted under the discretionary function exception of the tort claims act.

Dated: Dec. 8, 2010

Respectfully submitted,

/s/ WALTER J. HIMMELREICH
WALTER J. HIMMELREICH, PRO SE
Federal Register # 13152-067
Federal Correctional Institution - Elkton
P.O. Box 10 Unit BA
Lisbon, OH 44432

Certification

I hereby certify that the above statements are true and correct and that I will be placing this and the appropriate copies in the FCI-Elkton Legal Mail System on December 9, 2010. 28 USC § 1746.

Dated: Dec. 8, 2010

/s/ [ILLEGIBLE]

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. 4:10-cv-00307-JRA

WALTER J. HIMMELREICH, PLAINTIFF

v.

UNITED STATES OF AMERICA, DEFENDANT(S)

Jul. 23, 2012

Motion to Recall Judgment Under the Provisions of Federal Rule of Civil Procedure 60, §§ (a), (b)(4) and (6), (d)(1)

Now comes the Plaintiff, Walter J. Himmelreich, Pro Se, and humbly requests that this Honorable Court Recall its Judgment of Dismissal of the Federal Tort Claim which is the subject of the above captioned action before the Court; which the Court dismissed under Federal Rule of Civil Procedure 12(b)(1) for Lack of Jurisdiction; and avers the following in support thereof:

1) That the Court previously dismissed the above captioned action for Lack of Jurisdiction under Federal Rule of Civil Procedure 12(b)(1) upon the request of the Government

2) That the Plaintiff argued that there was merit to the claim and that the action should not be dismissed for Lack of Jurisdiction in accordance with the caselaw on the subject.

3) That since the Order of Dismissal by this Court, there has been new evidence in the form of an ORDER from the Sixth Circuit Court of Appeals in the sister BIVENS action filed in this Court to Docket Number 4:10-cv-02404-JRA (Appeal Number 11-3474) in Footnote 1, states that Negligence on the part of the Government was involved in the cause of this action before the Court.

4) That the Seventh Circuit Court of Appeals found in the case of Doe vs US, 833 F2d 220 (7th Cir., Ill, 1988) that where the Government affirmatively assumes the duty to protect a person prior to and independent of that person being assaulted and that duty to protect is breached leading to an assault on that person that the Government is required to protect, whether or not it is by a Government employee or another, a Federal Tort Claim arises out of the Government's negligence and 28 USC § 2680(h) does not bar a cause of action.

5) That in Gibson vs United States, 457 F2d 1392 (3rd Cir., NJ, 1972), a Federal Tort Claim was allowed because there was a foreseeable consequence from the Government's failure to exercise due care in its responsibilities.

6) In Nguyen vs United States, 556 F3d 1244 (11th Cir., Fl, 2009), determined that the 1974 change to the sovereign immunity waiver makes the Government liable in this case and states:

> "That year Congress amended the statute by adding an important proviso to § 2680(h), which turned that subsection around as to specified

claims against federal investigative and law enforcement officers. See Pub. L. No. 93-253, § 2, 88 Stat. 50, 50 (1974). Instead of excepting those claims from the waiver of sovereign immunity, as the subsection originally had, the proviso included them within the waiver. The specified claims are "any claim arising . . . out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution" based on acts "of investigative or law enforcement officers of the United States . . . ." Id. As amended, § 2680(h) now reads in its entirety:

> The provision of this chapter and section 1346(b) [the general waiver of sovereign immunity] of this title shall not apply to—***(h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights: Provided, That, with regards to acts or omissions of investigative or law enforcement officers of the United States Government, the provisions of this chapter and section 1346(b) of this title shall apply to any claim arising, on or after the date of the enactment of this proviso, out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution. For the purpose of this subsection, "investigative or law enforcement officer" means any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law. 28 USC

§ 2680(h), the "date of the enactment of this proviso" was March 16, 1974, See § 2, 88 Stat. at 50.

The straightforward meaning of subsection (h) as it now reads is that the United States has expressly waived its sovereign immunity for the claims listed in the proviso, which includes the claims made in this case."

7) That the Discretionary Function Exception which the Government argued in its case in point with the AFFIDAVIT of Unit Manager Streeval, the legal lisason for FCI-Elkton at the time, shows the NEGLIGENCE found the Sixth Circuit Court of Appeals which permits the Plaintiff the ability to file the Federal Tort Claim which he did file in the first place.

8) That the Plaintiff did argue that there is an exception to the Government's claimed Discretionary Function Exception, and which this Court dismissed when it ruled in the Government's favor by Dismissing the Federal Tort Claim filing of the Plaintiff for Lack of Jurisdiction under Federal Rule of Civil Procedure 12(b)(1).

9) That the Eleventh Circuit showed by the Canon of Statutory Construction that the proviso of 28 USC § 2680(h) (which is applicable in this case before the Court) trumps the Discretionary Function Exception of 28 USC § 2680(a), as was the intent of the United States Congress in 1974 when they wrote it. See Nguyen, 556 F3d at 1252-1259.

10) That the United States District Court for the Southern District of New York, in 1987, denied the dismissal of the Tort Claim to the Government based on the fact that the United States breached its affirmative duty to protect in Doe vs Scott, 652 F Supp 549.

11) That the Plaintiff is also still raising the issue of the harassment of the Government in instigating the dismissal of the Federal Tort Claim for $1,000,000.00 when it admitted the wrongdoing of its employees in the Affidavit and then still said that the Discretionary Function Exception trumped the proviso of 28 USC § 2680(h). The Plaintiff renews his request for treble damages of $3,000,000.00 for this harassment as punitive and punitive damages.

WHEREFORE, the Plaintiff, Walter J. Himmelreich, Pro Se, does hereby request that this Honorable Court Recall its judgment in regards to the Federal Tort Claim in the above captioned action.

The Plaintiff further requests that the amount of the Federal Tort Claim for the purposes of this litigation be understood to be a base amount as filed with the Administrative Agency of $1,000,000.00, and the previously requested $3,000,000.00 for harassment and damages against the Defendant(s) which are both punitive and putative; in accord with the Federal Case Law regarding Federal Tort Claims.

Dated: Jul. 23, 2012

Respectfully submitted,

/s/ WALTER J. HIMMELREICH
WALTER J. HIMMELREICH, PRO SE
Federal Register # 13152-067
Federal Correctional Institution - Elkton
P.O. Box 10 Unit BA
Lisbon, OH 44432-0010

Certification

I, Walter J. Himmelreich, Pro Se, the Plaintiff in the above captioned action, does hereby swear and affirm that the foregoing statements are true and correct, to the best of my limited knowledge so to state, and under the Penalty of Perjury, 28 USC § 1746. I furthermore swear that I will be placing the same in the FCI-Elkton Prison Legal Mail System on July 24, 2012, in accord with the Prison Legal Mailbox Rule of the Supreme Court in Houston vs Lack, along with a copy to stamp in and return to the Plaintiff and a copy for AUSA Heather Tonsing Velosin, Esquire, the legal counsel of record for the Defendant(s), and the proper postage prepaid envelopes.

Dated: July 23, 2012

Respectfully,

/s/ WALTER J. HIMMELREICH
WALTER J. HIMMELREICH
Federal Register # 13152-067
Federal Correctional Institution - Elkton
P.O. Box 10 Unit BA
Lisbon, OH 44432-0010

Rule 60. Relief from a Judgment or Order

(a) **Corrections Based on Clerical Mistakes; Oversights and Omissions.** The court may correct a clerical mistake or a mistake arising from oversight or omission whenever one is found in a judgment order, or other part of the record. The court may do so on motion or on its own, with or without notice. But after an appeal has been docketed in the appellate court and while it is pending, such a mistake may be corrected only with the appellate court's leave.

(b) **Grounds for Relief from a Final Judgment, Order, or Proceeding.** On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:

(1) mistake, inadvertence, surprise, or excusable neglect;

(2) newly discovered evidenct that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);

(3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;

(4) the judgment is void;

(5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacted; or applying it prospectively is no longer equitable; or

(6) any other reason that justifies relief.

(c) **Timing and Effect of the Motion.**

(1) *Timing.* A motion under Rule 60(b) must be made within a reasonable time-and for reasons (1), (2), and (3) no more than a year after the entry of the judgment or order or the date of the proceeding.

(2) *Effect on Finality.* The motion does not affect the judgment's finality or suspend its operation.

(d) **Other Powers to Grant Relief.** This does not limit a court's power to:

(1) entertain an independent action to relieve a party from a judgment, order, or proceeding;

(2) grant relief under 28 U.S.C. § 1655 to a defendant who was not personally notified of the action; or

(3) set aside a judgment for fraud on the court.

(e) **Bills and Writs Abolished.** The following are abolished: bills of review, bills in the nature of bills of review, and writs of coram nobis, coram vobis, and audita querela.

(Amended March 19, 1948; Oct. 20, 1949; Aug. 1, 1987; Dec. 1, 2007.)